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Supreme Court of the United States

October Term, 1971

No. ..... 71 - 557

JEROME DEUTSCH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI IN CRIMINAL ACTION

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Supreme Court of the United States

OCTOBER TERM 1971

No. .....

JEROME DEUTSCH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI IN CRIMINAL ACTION

Petitioner Jerome Deutsch prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his judgment of conviction after a jury trial in the Southern District of New York under 18 U. S. C. §2 of aiding and abetting one Frank D. Mills in violating 15 U. S. C. §80a-§17(e)(1) of the Investment Company Act of 1940 and an order of the District Court denying a writ of error *coram nobis*. The appeals from said judgment and order to the United States Court of Appeals were consolidated by order of said Court, and were argued and decided together.

The opinion of the Court of Appeals (Appendix, pp. 1a-36a, *infra*) has not yet been reported. The opinion by District Judge Charles M. Metzner refusing to entertain jurisdiction of petitioner's *coram nobis* proceeding, dated January 29, 1971, is reported at 321 Fed. Supp. 1356, and a copy thereof is printed at pages 40a-45a of the Appendix to this petition. The opinion by Judge Metzner dated June 18, 1970 denying petitioner's motion to dismiss Count

VI of the indictment under which he was found guilty, decision of which was reserved at the trial, and for a new trial is not officially reported but a copy thereof is printed at pp. 37a-39a of the Appendix annexed hereto.

The grounds on which the jurisdiction of this Court is invoked are as follows:

The judgment sought to be reviewed is dated September 21, 1971 and was entered upon that date in the office of the Clerk of the United States Court of Appeals for the Second Circuit, Foley Square, New York, N. Y. A copy is set forth at pp. 44a-45a of the Appendix annexed hereto.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U. S. C. §1254(1).

The questions presented for review are, briefly stated, as follows:

(1) Did the Court of Appeals err in construing 15 U. S. C. §80a-17(e)(1) as a mere gratuity statute, requiring nothing more to be established to sustain a conviction thereunder than that an affiliated person of an investment company, as defined in the Act, shall have received a thing of value given from gratitude for previous conduct engaged in by the affiliated person without promise or expectation of reward and although at the time of such performance by such affiliated person no gratuity had been mentioned or was in contemplation by either the alleged donor or donee?

(2) May an affiliated person of an investment company be convicted under 15 U. S. C. 80a-17(e)(1) who receives an alleged gift of a thing of value in the form of an opportunity to purchase investment securities at a discount price which is not given for the purpose of influencing his conduct as a representative of the investment company with

which he is affiliated, and even though it is received without notice to the donee of the existence of any such intent on the part of the donor in making the gift and he does not participate or influence the decision of such investment company in making the purchase, if such investment company purchases securities of the same nature for its own investment portfolio?

(3) Is an affiliated person of an investment company prohibited under criminal sanctions by 15 U. S. C. 80a-17 (e)(1), on account of conflict of interest, from acquiring or holding as an individual investment securities of the same nature as are acquired or held by the investment company with which he is affiliated, either before or after or at the same time such individual purchases are made by the affiliated person, and regardless of whether they are bought by him at a higher or lower price than that which is paid by such investment company?

(4) Did the Court of Appeals err in deciding that an affiliated person within the meaning of 15 U. S. C. 80a-17 (e)(1) could, "*acting as agent*, * * * accept compensation * * * for the purchase or sale of any property to or for such registered company" even though he takes no part in the decision to make the purchase and exercises no influence in connection therewith? (Emphasis supplied.)

(5) Did the Court of Appeals err in construing 15 U. S. C. 80a-17(e)(1) as meaning that affiliated persons of investment companies who are not acting as brokers are *ipso facto* "acting as agents" of the investment company, and in ruling as matter of law that Frank D. Mills was acting as agent for Puritan and Fidelity Trend funds by being an affiliated person not acting as broker, regardless of whether he participated in these transactions on behalf of the funds by influencing their decisions to buy these securities?

(6) Did the Trial Court err in ruling and instructing the jury that Mills could have been "acting as agent" for Puritan and Fidelity Trend even though Mills took no part in the decisions to make the purchases and exercised no influence in connection therewith?

(7) Should Count VI of the indictment (under which Deutsch was convicted) have been dismissed as a matter of law in view of the Court's ruling that Mills did not "effect the purchase by Fidelity" and in view of the further fact that the prosecution's affirmative proof demonstrated that Mills took no part in the making of the purchase, and the admission by the Government that he received no compensation given with intent to influence the purchases by Puritan?

(8) Under 15 U. S. C. §80a-17(e)(1) is it sufficient to prove that the defendant was merely an "affiliated person" not acting as broker or must it not be shown that he was "acting as agent" in making or influencing the decisions of the funds to buy Realty Equities securities in addition to being an affiliated person"?

(9) Is §80a-17(e)(1) unconstitutional and void and a deprivation of life, liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States by reason of the ambiguity of its provisions as a criminal statute?

(10) Does 15 U. S. C. §80a-17(e)(1) cover an affiliated person who acts as agent for an investment company instead of covering merely an affiliated person of a registered investment company who is "acting as agent" for an outsider in transactions with the investment company?

(11) Did the Court of Appeals err in upholding the reception of and refusal to strike out hearsay declarations by Mills, who was a co-defendant and whose guilt was a

prerequisite to that of petitioner, as betraying a consciousness of guilt on Mills' part—notwithstanding that these declarations were not an admission of facts which were an integral part of the crime charged—without calling Mills as a witness for the prosecution, with the consequence that Deutsch was denied his constitutional right of confrontation under the Sixth Amendment to the Constitution of the United States which would have enabled him to cross-examine Mills so as to ascertain, among other matters, whether he did think he was guilty of this crime or whether he wanted privacy about his purchase for some other reason?

(12) In view of the trial court's admission (and refusal to strike out) the hearsay testimony of Mills' conduct and alleged admissions, did the trial court err in excluding Mills' testimony before the Grand Jury and before the SEC which testimony was exculpatory in nature and would have exonerated Deutsch and which would have tended to explain Mills' alleged admissions against interest?

(13) Was appellant Deutsch deprived of his constitutional right to a fair trial under the Fifth Amendment by reason of the prosecutor's inflammatory assertions that Deutsch was guilty: (a) because of claimed violation by Mills of SEC rules which had no relation to the statute under which Deutsch was convicted; (b) because of claimed violation by Mills of a private code of ethics (of which Deutsch knew nothing); (c) that concealments by Mills were attributable to Deutsch; (d) that it was "unimportant" whether or not specific favors were in the contemplation of Deutsch "at the time he tried and succeeded in corrupting Mills"?

(14) Was appellant Deutsch deprived of his constitutional right to fair trial under the due process of law guaranteed to him by the Fifth Amendment as a result of

the prosecutor's comment on the failure of Mills to take the witness stand?

(15) Did the court err in making Mills a silent witness against Deutsch by instructing the jury that Mills was not under the control of either side and that they were free to draw whatever inferences they wished as to the failure of either party to call Mills?

(16) Was Deutsch thereby and by the admission and refusal to strike out alleged hearsay admissions by Mills denied confrontation by the chief witness against him in violation of the Sixth Amendment to the Constitution of the United States, and did not this constitute reversible error especially in view of the fact, unknown to the jury, that Mills was under the control of the Government awaiting sentence on the count to which he had pleaded guilty and while other counts were still being "held open" against him under an implied agreement that he could expect leniency if he cooperated with the prosecution in not testifying for Deutsch?

(17) Was appellant Deutsch denied a fair trial, under the circumstances mentioned, as a result of the prosecutor's telling the jury that if Mills' testimony was favorable he would have been called as a witness for the defendant, when at the same time the prosecutor knew that Mills' testimony before the Grand Jury and the SEC was favorable to appellant Deutsch and would have been elicited except for the fact that Mills was in the control of the Government by reason of the circumstances recited in the last question?

(18) Did the court err in charging the jury that Mills was not under the control of either the Government or the defendant at a time when, unknown to the jury, Mills had pleaded guilty to one count and was awaiting sentence thereon and when the other counts against him were still being "held open" and hung over his head?

(19) Did not the dismissal of Count V against Mills make mandatory the dismissal of Count VI against Deutsch? Could Deutsch be found guilty of aiding and abetting Mills in the commission of a "crime" charged against Mills where the charge against Mills has been dismissed upon the merits?

(20) Since Count I is inconsistent with Count V and since Mills was sentenced under a plea of guilty as a principal (Count I) and the mutually exclusive charge of acting as agent (Count V) was dismissed, does it not follow that the Government is barred from prosecuting Deutsch for aiding and abetting Mills under Count V?

(21) Is there evidence sufficient to require submission to a jury of the charge that Frank D. Mills accepted or that petitioner paid "compensation * * * for the purchase * * * of * * * property" by Puritan or by Fidelity Trend within the meaning of 15 U. S. C. §80a-17(e)(1)?

(22) Since there was no evidence that the alleged compensation was paid to Mills with the intention of influencing him to influence the Puritan purchases (as the Government admits), and the Trial Judge submitted that issue to the jury to render a general verdict with respect to both funds without making separate findings as to each, and it is impossible to know upon which fund transaction the verdict was based, inasmuch as the jury were instructed to render a verdict of guilty if they found guilt with respect to either fund without specifying which, must there not in any event be a new trial?

(23) Should there not at least be a new trial inasmuch as the construction placed upon §17(e)(1) by the Court of Appeals as a gratuity statute was not adopted by the Trial Court, who charged the jury that compensation had to have been paid to Mills to his knowledge with the intent to influence him to cause or influence the funds re-

spectively to make these purchases (which became the law of the case), and the jury never had presented to them nor decided the issue of whether Mills' opportunity to buy this security was diverted to him to his knowledge as a gratuity for the Puritan purchase?

Constitutional and Statutory Provisions and Regulations

The constitutional provisions, statutes and regulations which the case involves are the Fifth and Sixth Amendments to the Constitution of the United States; 15 U. S. C. 80a-(2)(3), (6), 3, 17(a), (c), (d), (e)(1)(2), 47, 48; Title 17, Code of Federal Regulations, §270.17(d)1 (sec.). These regulations are not involved in the crime of which petitioner was convicted and are of only collateral importance. The texts are printed in the Appendix to this petition.

Statement of Facts

The "compensation" alleged to have been paid to Mills consisted in the diversion to him of a supposedly advantageous business opportunity for the purpose of inducing him to influence two mutual funds to purchase certain securities. One of these funds bought before the Mills' transaction (Puritan); the other fund bought afterwards (Fidelity Trend). Mills bought at a higher price than Puritan and at a lower price than Fidelity Trend. The record lacks evidence that the opportunity was extended to Mills for the purpose of influencing him (the Government's brief admits that there was no such evidence in the case of Puritan (pp. 34-5)), but to sustain the conviction the Court of Appeals ruled—differently from the District Court—that intent to influence the funds through Mills to make these purchases was not an ingredient of

the crime on the interpretation that, contrary to its wording and object, 15 U. S. C. §80a-17(e)(1) is a mere gratuity statute rendering criminal the acceptance by an affiliated person of any favorable business opportunity even though done with no intent to influence his conduct. This statute has not been generally so understood or construed as evidenced by the fact that this is the first and only criminal prosecution that has been instituted under it during the 30 years of its existence. If this statute means what the Court of Appeals now says it does, this opens the way to dragnet procedures whereby almost any affiliated person of an investment company—including, among others, stockholders, parent or subsidiary corporations, affiliates, investment advisers, officers, partners, directors or employees (see definition of affiliated person 15 U. S. C. §80a-2(3)) can be prosecuted criminally for individually owning any of the same securities which are held by the investment company with which he is thus affiliated. Mere ownership would create conflict of interest, according to the opinion, regardless of the prices at which they were acquired. This includes practically every stock, bond or other security on or off the board especially if they are private offerings or are bought with any kind of special information or informed investment advice which is likely to be exchanged between persons in various relationships in this line of business. The conflict of interest feature, prominently emphasized in the Court of Appeals' opinion, would always be present in some form, and it could almost always be alleged that the purchase price was different from that paid by the investment company as would usually be the case in a fluctuating market. However situations of that sort may be dealt with by other statutes or regulations, petitioner submits that the Congress did not intend them to be covered by 15 U. S. C. §80a-17(e)(1). This is a matter of such general importance and magnitude as to merit review by the Supreme

Court of the United States in the only criminal action which has ever arisen under this provision. The situation is aggravated by the circumstance that the Court of Appeals has virtually written out of this statute the language that the affiliated person must have accepted compensation while "acting as agent" for his investment company, and by the confusing and unwarranted construction that every affiliated person as above defined by 15 U. S. C. §80-a-2(3) is as matter of law "acting as agent" for the company unless he is acting as broker regardless of whether he participates in or does anything to influence a purchase or sale by the company.

The salient facts are that Realty Equities Corporation of New York, of which petitioner was executive vice-president, a director and member of the executive committee, in 1968 raised $17,000,000 for its operations by issuing 15 year 7½% promissory notes with stock purchase warrants attached. Deutsch was in charge of selling these securities, which were disposed of to 13 institutional investors between January 16 and August 9 inclusive. These were in the form of units each consisting of $500,000 notes and warrants for the purchase of 37,500 shares of Realty stock. The stock which could be acquired by the exercise of these warrants was not registered with the SEC and, therefore, was not tradable on any exchange and the prospectus stated specifically that there was no market for the warrants (Ex. 3).*

These notes and warrants were all sold to these institutional purchasers at par for the notes with no premium for the warrants, notwithstanding that a lesser amount of other common shares, of the same classification, had been listed on the American Stock Exchange and were traded at prices fluctuating between $10⅛ per share at the beginning of

* Where not otherwise indicated, the numbers in parentheses refer to the pages of the joint consolidated appendix in the Court of Appeals and the exhibit volume.

1968 and $30 per share in July and August 1968 (Ex. 36, p. 70, Exhibit Volume). These stock purchase warrants were exercisable during this period on payment of $15.25 per share. Nevertheless no premiums were paid by any of the institutional investors during this entire interval of time.

Among these institutions was Puritan, of which Frank D. Mills was portfolio manager, which purchased $1,000,000 in notes February 29, and $700,000 additional June 14, 1968, with the accompanying warrants. The reason on account of which nothing extra was paid for the warrants was doubtless that the shares into which the warrants could be converted were not registered, listed nor readily marketable, and, also, probably because of the narrow market for the other listed shares of the same denomination as well as the depressing effect upon the market which the conversion of this note issue would be likely to have.

The Puritan and Fidelity Trend purchases were distinct and independent transactions at different times and different prices which the Government's bill of particulars admits reflected the value of the notes and warrants at the times when they were bought (974). Puritan paid at the rate of $500,000 per unit including the accompanying warrants. Eight months and four months respectively after the Puritan purchases, both at that price, Fidelity Trend bought at the rate of $928,125 per unit. Mills paid at the rate of $537,500 per unit (Court of Appeals' opinion, p. 9).

Count V of the indictment charged that Mills thus accepted compensation for the purchase of property by both Puritan and Fidelity Trend (971), the bill of particulars stated that both fund purchases represented the property purchased which was referred to in the indictment, and the Trial Judge submitted the issue to the jury with respect to both funds, calling for a general verdict of guilty if the

jury were persuaded that Mills held a position where he could influence the purchase of these securities by either Puritan or Fidelity Trend and was given compensation to his knowledge because of this position with the intent of influencing him to aid in making either purchase (767).

The general verdict of guilty does not disclose or determine whether the jury made this decision in the case of the purchase by Puritan or Fidelity Trend or both. Petitioner argued as appellant in the Court of Appeals that there was no evidence to sustain this verdict in the case of either fund, but that, in any event, there would at least have to be a new trial inasmuch as the Government admitted for the first time in its brief in the Court of Appeals (pp. 34-5) that "The Government cannot claim to have proved that Deutsch acted with intent to influence the Puritan purchase, for it preceded the payment of the compensation." This established that there was no basis on which the Trial Court could have submitted the issue to the jury under the law of the case with respect to Puritan and, inasmuch as it cannot be determined from the verdict whether the jury based its decision on the Puritan or Fidelity Trend transactions, there would at least have to be a new trial. The Court of Appeals apparently recognized the force of this position, but met it by ruling that the Trial Judge erred in charging the jury that intent to influence Mills was an ingredient of this crime and that it would be enough to convict on the basis of the Puritan transaction if the jury determined that the opportunity was later extended to Mills to make this purchase for himself purely out of gratitude for his having made the earlier purchases as portfolio manager of Puritan. It was never submitted to the jury to decide whether this was done by Deutsch or believed by Mills to have been done by him out of gratitude for the Puritan purchase, but only whether it was done to influence the Puritan purchase. The latter,

of course, could not have happened unless there had been a previous promise that this would be done if he made the Puritan purchase, of which there is no evidence. The Government and the Court of Appeals' opinion emphasize that by the time of the Mills' purchase the securities bought by him for Puritan had nearly doubled in value, which they did on their own merits as reflected by the quotations on the American Stock Exchange, and it is unlikely that the jury would have found that Deutsch or Realty did this or Mills expected it out of gratitude to the latter for Realty's doubling the paper value of the holdings of the fund which Mills had bought as portfolio manager of Puritan. The jury never passed on that question since the law of the case established by the charge was that the issue regarding Puritan depended upon whether it had been sought to influence Mills in advance of the Puritan purchases through some implication of a promise having been made to him that he would receive "compensation." It is difficult to understand how the Court of Appeals could have considered that a finding by the jury that there was such an advance promise (of which the Government concedes there was no evidence) could be equivalent to a finding that eight and four months after the Puritan purchases Deutsch did this for Mills purely out of gratitude for what had happened earlier. If gratitude entered the picture, and if the question had been submitted to the jury, it is more than likely that the jury would have thought that Mills would have been grateful to Realty for having nearly doubled the value of Puritan's holdings by good management and good prospects rather than the other way around.

An important reason on account of which petitioner asks the Supreme Court of the United States to review this affirmance of his judgment of conviction is that in erroneously deciding that 15 U. S. C. §80a-17(e)(1) is a mere

gratuity statute, contrary to its language and apparent interpretation until now, in the first criminal prosecution which has ever been conducted under it, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court (Rule 19 of the Rules of the Supreme Court of the United States). This is a matter of wide consequence affecting the entire personnel of mutual funds and other investment companies throughout the United States which, as both the Court of Appeals and the Government have been careful to point out, is a large industry. Petitioner contends that this statute requires that "compensation" shall be accepted by affiliated persons of investment companies only when given to them for the purpose of influencing their conduct with respect to the funds with which they are connected, and also only when, as the language requires, "compensation" is accepted by such persons acting as agents for their respective companies. Indeed the context of the statute and the Congressional Committee Reports would even tend to indicate that this statute is only applicable where the affiliated person is acting as agent for an outsider in dealing with the investment company. These points will be discussed somewhat further in the argument which is to follow this statement of the facts. It is enough to indicate at this point that there should be a reversal on this aspect (1) if 15 U. S. C. §80a-17(e)(1) is construed to require that compensation be paid to an affiliated person for the purpose of influencing him in obtaining a purchase of the security by the fund or (2) if the language of said statute that the affiliated person must have accepted the compensation while "acting as agent" for the fund (in contradistinction to "acting as principal" in subdivisions a and d of the same section) signifies that the affiliated person must have participated in or influenced the decision of the fund to purchase the securtiy or (3) if said statute is construed to require that such person

shall have been acting as agent for a third party dealing with the investment company.

Petitioner contends that there is no evidence that the Mills' purchase was arranged with intent to influence Mills with respect to the purchases by either fund, that there is no evidence that Mills accepted or Deutsch paid compensation to him for acting in the capacity of agent for either fund, that for these reasons the indictment should have been dismissed on the law and that, at the very least, a new trial should have been granted in view of the Government's admission, among other reasons, that there is no evidence that any compensation was paid to Mills or accepted by him with knowledge that it was paid for the purpose of influencing him to make the purchases by Puritan. The Government attorney made an extended and determined argument to the jury that they should convict on account of the Puritan transaction, which is reverberated in the opinion by the Court of Appeals; the Puritan transaction has been treated by the Government and both of the courts below as of primary importance in this conviction. The Court of Appeals recognized, in effect, that the conviction cannot stand on the law of the case as it was charged to the jury regarding Puritan, and that the verdict may well have been based upon the Puritan transaction. Petitioner submits that he is entitled to a reversal if, in order to sustain the conviction on the basis of the Puritan transaction, the Court of Appeals misconstrued 15 U. S. C. §80a-17(e)(1) as a mere gratuity statute, and likewise, for the reason that under the law of the case the jury were not called upon to decide and did not decide whether (many months later) the Mills' transaction was made available to him as a gratuity for having effectuated the Puritan purchases.

The discrepancy between the price paid by Mills and by Fidelity Trend in October 1968 was accounted for by petitioner at the trial by an explanation which the Trial Court

rightly held would require acquittal if believed by the jury. Petitioner takes the well founded position that the undisputed evidence (including testimony by a Government witness) established this explanation as matter of law. Petitioner also forcefully urges that assuming *arguendo* that there was a question of fact for the jury to decide concerning the existence of the facts underlying this explanation, the trial was conducted in a manner highly prejudicial to him on this issue, that he was denied important constitutional rights of confrontation in violation of the Sixth Amendment to the Constitution of the United States, that he was denied due process of law in violation of the Fifth Amendment by the adverse comments to the jury by the prosecuting officer concerning petitioner's co-defendant not taking the witness stand, and the instruction by the Trial Judge to the jury that Mills was not under the control of the Government, and that they could draw adverse inferences against petitioner for the reason that petitioner did not call Mills as his witness at a time when he was awaiting sentence on the first count in the indictment, to which he had pleaded guilty, and when Counts II and V had not been dismissed and were still pending against him. Mills was greatly concerned that he might be sentenced to prison, which Judge Metzner told him he would have done except for his age when he sentenced him after Deutsch's trial (946), Mills spent many hours conferring with the Assistant U. S. Attorney prior to Deutsch's trial, and most apparently he was reluctant to testify in favor of Deutsch (by reiterating his testimony before the Grand Jury and the SEC) lest it might lead to increasing the severity of his sentence and his treatment under the other two open counts of the indictment. Indeed on the argument of the *coram nobis* application the District Judge said that the subsequent dismissal of the count against Mills charging the crime in which Deutsch has been convicted of aiding and abetting him,

> "was part of an agreement that he made with the United States Attorney's office, which was to the effect I will plead guilty to one count of the indictment, will you dismiss the others" (1053-1054).

His plea was accepted but the other counts were not then dismissed. It is plain enough that Mills considered that this "agreement", whether expressed or implied, was conditioned upon his continuing his cooperation with the Government which his own attorney told the District Judge at the time of his sentencing after petitioner's trial that he would have been prepared to do if he had been called as a witness (939-940). The sentencing memorandum which Mills' attorney submitted to Judge Metzner when Mills was sentenced, and which petitioner saw for the first time when it was revealed by the Government's brief in the Court of Appeals (printed by stipulation at pp. 112-116 of the Exhibt Volume in the Court of Appeals, but without petitioner's being bound thereby) eloquently discloses the extent to which Mills was under the control of the Government and felt under pressure from the U. S. Attorney's office. This will be discussed further under the heading of the argument amplifying the reasons relied on for the allowance of this writ. Notwithstanding all of this, the Court of Appeals in its opinion held that the Trial Judge correctly instructed the jury that as matter of law Mills was not under the control of the Government and, in effect, that Deutsch could be convicted for not calling Mills as his witness. The same Court of Appeals took the opposite view as recently as 1970 in *United States* v. *Padgent* (432 Fed. 2d 701, 705, 2 Cir.) stating:

> "Here the accomplice, Miss Daniels, had reason, in addition to the fact that sentence had not yet been imposed upon her for her complicity in the passing of the counterfeit bills, to make sure that her testimony did not disappoint the prosecution.

> Having 'jumped' bail, she was vulnerable to an indictment for having done so, and she may have wondered about what action the Government might take against her if, after she testified on behalf of the prosecution, defendant Padgent was not convicted."

This is a question of profound importance to the entire criminal bar, which can be counted upon to support unanimously the realism of the view expressed by the Second Circuit in the *Padgent* case as contrasted with the case at bar. No trial lawyer who understands his business would have been likely to have called Mills as a witness for the defense in the case, and thereby vouched for his credibility under those circumstances. This is a question of wide professional importance.

It undoubtedly counted heavily against petitioner in the minds of the jury that there was this discrepancy in the prices paid during October 1968 by Mills and Fidelity Trend with which he was connected although not as portfolio manager. The explanation of this discrepancy testified to by Deutsch, corroborated by the president and also the general counsel of Realty (who is a former president of the Bronx County Bar Association), and by Mills himself in his testimony before the Grand Jury and the SEC—which was excluded by the District Judge and which could not be elicited from Mills himself since he was not called as a witness for the prosecution—was that after making the first purchase for Puritan, Mills asked to buy some of this security for himself, but was turned down for the reason that it was company policy of Realty to issue these notes and warrants only to institutional investors, as was stated in the prospectus, but he was told further that if any were reacquired by Realty, Mills could have one unit on a resale at whatever price Realty

had to pay for it to which Mills assented (457-469; 407-408; 434-435; 471; 473; 408; 435).

This security did become available on resale in view of the circumstance that Republic National Life Insurance Company, of Texas, which bought $6,000,000 of the notes and accompanying warrants on January 16, 1968, needed to reduce its holdings on account of Texas insurance regulations and other government regulations unrelated to the worth of the security. This led to the making of a written agreement May 23, 1968 between Realty and Republic whereby the former agreed to repurchase 5 units to be delivered and paid for over a period commencing August 30, 1968 through August 31, 1972 at prices ranging between 75 cents to $1.05 for each warrant plus par for the notes.

Realty through Deutsch carried out this understanding with Mills about the middle of October by transferring or arranging for the transfer to him (and another with whom he shared the deal) of a single unit ($500,000 note with accompanying 37,500 warrants) for which a premium was paid of $1.00 for each warrant. This was the price set by the May 23, 1968 agreement whereby Realty reacquired this unit from Republic Life. If the transfer to Mills had been effected on May 23, 1968, or at any time prior to September of that year, then, under the law of the case as fashioned by the charge, Mills could not have been guilty under Count V nor Deutsch of aiding and abetting him for the reason that making the transaction available to Mills could not have amounted to paying him "compensation" since the price would have been in line with the value as established by the resale from Republic to Realty and the issuing price by Realty to other institutional investors then and through August 1968. Even Puritan bought its second installment June 14, after the Republic contract of resale to Realty, for slightly less than

Mills paid himself. The problem arose due to the circumstance that the agreement of May 23, 1968 with Republic did not provide for immediate delivery and payment, but stated that on or before August 30, 1968 Realty would purchase one unit consisting of $500,000 of notes and 37,500 warrants—the same amount promised to Mills—for a total price of $528,125 and a second unit at the same price (which was the one transferred to Mills at the price acquired from Republic) on or before November 30, 1968. The value of this security rapidly appreciated after the end of August, partly due to the circumstance that a registration statement was filed in September with the SEC for the shares of common stock which would be purchased by the exercise of the warrants, which, if approved, would mean that these shares would become marketable and doubtless be listed on the American Stock Exchange along with the lesser number of common shares which had already been registered and listed thereon and had risen in price during the first three quarters of the year. This triggered the appreciated prices at which two units were sold to Banque de Paris September 30 at a unit price of $928,125 and a like amount at the same price to Fidelity Trend on October 24.

The understanding between Realty Equities and Mills was not in writing—which was the case also with a number of other aspects of Realty's transactions—and the District Judge understood clearly that it was not enforceable under the statute of frauds (§8-319 Uniform Commercial Code) but nevertheless charged the jury that they must acquit if they found that this oral commitment to Mills was made in February or at any time before September 1968 (766-767). The Trial Court rightfully perceived that, whether legally enforceable or not, there could be no criminality in fulfilling an oral agreement of the nature mentioned which was made with no intention of selling at a discount price if, in closing the deal in the

middle of October, Realty and Deutsch were merely being as good as their word given to Mills in February-March, June and August. There could be no crime under such circumstances even if the value of these securities rose after the end of August. The Government acknowledged that they were worth what Fidelity Trend paid for them, October 24 (974). Guilt under 15 U. S. C. §80a-17(e)(1) requires *mens rea;* compensation must wilfully, knowingly and unlawfully be accepted by and paid to the affiliated person in order to render him guilty (§80a-47; Indictment, 971). The necessary criminal intent would be absent, the Trial Court recognized, if petitioner's explanation of the discrepancy in price were to be accepted. Petitioner contends that there was no issue of fact on this phase of the case to submit to the jury inasmuch as there was no way in which the jury could properly find that the commitment was made to Mills for the first time in September or thereafter. No one so testified, and there was no evidence to that effect. *Petitioner contends further that even if this question presented an issue of fact, there was fundamental unfairness in the manner in which it was tried and submitted to the jury. That will be discussed further under the next heading herein.*

Ironically under Count V of the indictment which charged Mills with the crime in which Deutsch has been convicted under Count VI of aiding and abetting him, the principal (Mills) has been exonerated. It is well established that there can be no conviction of another for aiding and abetting in the commission of a crime which it has been adjudicated was not committed (*U. S.* v. *Pyle,* 279 Fed. 290; *People* v. *Daghita,* 301 N. Y. 223, 228; *Mercer* v. *Commonwealth* (Ky.), 330 S. W. 2nd 734; *People* v. *Moro,* 23 N. Y. 2d 496, 500; *Kelley* v. *State,* 79 Fla. 182; 16 ALR 1465). Unless Mills is guilty under Count V, no crime was committed by any person (cf. *Von Patzoll* v. *United States,* 163 Fed. 2d 216, cert. den. 232 U. S. 809).

Moreover, under the decisions above cited, inasmuch as the judgment of conviction of Mills under his plea of guilty to Count I, which charges him with having acted as principal in the transaction, is inconsistent with Count V which charges him with having acted as agent, the adjudication under Count I precludes a determination that he was guilty under Count VI. *Res judicata* and collateral estoppel are applied to criminal as well as civil proceedings (*Sealfon* v. *United States,* 332 U. S. 575, 578).

Argument Amplifying the Reasons Relied On for the Allowance of the Writ

The Court of Appeals said that prior to the present case "no court, so far as we know, has discussed the intent of Congress in enacting §17(e)(1)" (Opinion, pp. 12-13).

This is without doubt a very important item of legislation. If it had commonly been believed to have as broad a coverage as the Court of Appeals has indicated in this case, this would probably not have been the first and only criminal prosecution thereunder. Both the District Court and the Court of Appeals found it obscure and difficult to interpret, the latter writing a 35 page opinion. In a previous civil action Chief Judge Henry J. Friendly, as he now is, characterized another subdivision of the section with which we are dealing as "esoteric" (*SEC* v. *Sterling Precision Corp.,* 393 Fed. 2d 214), and in interpreting it said "Making our own guesses as best we can" (p. 218). This felony conviction against petitioner, if it stands, destroys his promising financial career at the age of 41. Although not sentenced to prison, it entails the devastating consequences vividly described in the opinion of the Supreme Court in *Carafas* v. *La Vallee* (391 U. S. 234). He contends that the judgment of conviction against him should be reversed and that the decision by the Court of

Appeals is erroneous by reason of all of the questions for review hereinbefore stated. In stressing some of these questions by way of argument under this heading petitioner does not abandon but reasserts the others. He appealed to the Court of Appeals for the Second Circuit both from his judgment of conviction in the District Court and also from an order refusing to entertain his application for a writ of error *coram nobis*. These appeals were consolidated and argued together by order of the Court of Appeals. He is, therefore, entitled to review of all of the material presented either on the trial or by the papers in the *coram nobis* proceeding.

Petitioner respectfully asserts that the Court of Appeals erred, among other respects, some of which have been previously mentioned, (1) in its construction of 15 U. S. C. §80a-17(e)(1) as being a mere gratuity statute not requiring the prosecution to establish either that compensation has been accepted by an affiliated person of an investment company knowing that it is paid with intent to induce him to participate in or influence the purchase or sale of property by the company with which he is connected, nor that he accepted the compensation for acting as agent in consummating or influencing the purchase or sale, (2) that the Court of Appeals has disregarded the rule that before a man can be punished as a criminal under the federal laws his case must be plainly and unmistakably within the provisions of some statute (*United States* v. *Gradwell*, 243 U. S. 476, 485), that there are no common law offenses against the United States (*United States* v. *Eaton*, 144 U. S. 677) and the principle stated in the concurring opinion by Justice Jackson in *Krulewitch* v. *United States* (336 U. S. 340, 456-7), that "We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation," (3) that §17(e)(1) of the Act is unconstitutional and void as a criminal statute under the due process

clause of the Fifth Amendment on account of vagueness and ambiguity (4) that the acts and declarations of Mills which were introduced by the prosecution at hearsay for the purpose of showing a consciousness of guilt upon his part by concealment of his making this purchase, were necessarily received against Deutsch, inasmuch as guilt on the part of Mills was a prerequisite to that of petitioner, whatever implicated Mills implicated Deutsch, and it was fundamentally unfair and in violation of petitioner's right to confrontation under the Sixth Amendment to have received evidence of these acts and declarations at hearsay and to treat Mills' concealments as having expressed a consciousness of guilt upon Mills' part and thereby making Mills, in effect, a witness against petitioner without opportunity for the latter to cross-examine him concerning any relevant matter and particularly his reasons for such concealments which may have been prompted by other causes than a guilty consciousness of this crime, (5) that petitioner was denied due process of law in violation of the Fifth Amendment by the comments to the jury by the prosecuting officer to the effect that Mills must have been guilty or he would have testified as a witness in petitioner's behalf and by the statement of the court to the jury that, as matter of law, Mills was not under the control of the Government and that they could draw whatever inferences they chose against petitioner by reason of his not calling Mills to testify, (6) that the petitioner was deprived of a fair trial under due process of law on account of the prosecutor's repeated inflammatory statements to the jury that it was unimportant whether the specific favors were in the contemplation of petitioner which were charged in the indictment and the Government's bill of particulars, viz., the particular purchases made by Puritan and Fidelity Trend, but that it was enough if it was done "because of who Mr.

Mills was and what he potentially could do for him and what he had done for him in the past" (705-706, 721). The Court declined to correct these misstatements before the jury on defense counsel's request (752-754, 767), and the manner in which this subject is treated in the opinion of the Court of Appeals indicates that it considered that Mills must have thought he was guilty if he broke SEC rules, which are not an ingredient of this crime, or engaged in conduct other than that specified in the indictment or bill of particulars with no opportunity to petitioner to explain except by calling Mills who was under the control of the Government, and (7) a dismissal on the merits of the fifth count against Mills requires the dismissal of the conviction against Deutsch and so, also, does the judgment of conviction entered against Mills on the first count which is mutually exclusive of his being guilty under Count V which would be a necessary condition precedent to petitioner's conviction.

Interpretation of the Phrase "Acting as Agent"—Requisite Intent Under Section 17(e)(1)—Ambiguity

The operative portion of §17(e)(1) is as follows:

> "(e) It shall be unlawful for any affiliated person of a registered investment company, or any affiliated person of such person——
>
> (1) *acting as agent, to accept from any source any compensation (other than a regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker; or*
>
> (2) acting as broker, in connection with the sale of securities to or by such registered company or

> any controlled company thereof, to receive from any source a commission, fee, or other remuneration for effecting such transaction which exceeds (A) the usual and customary broker's commission if the sale is effected on a securities exchange, or (B) 2 per centum of the sales price if the sale is effected in connection with a secondary distribution of such securities, or (C) 1 per centum of the purchase or sale price of such securities if the sale is otherwise effected unless the Commission shall, by rules and regulations or order in the public interest and consistent with the protection of investors, permit a large commission" (Emphasis supplied).

In *Winters* v. *New York*, 333 U. S. 515, 516-517, the Supreme Court said that

> "The criminal code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit."

In that case the Court further said:

> "men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be *from uncertainty in regard to persons within the scope of the act, Lanzetta* v. *New Jersey*, 306 U. S. 451, *or in regard to the applicable tests to ascertain guilt*" (Emphasis supplied).

Neither the District Court nor the Court of Appeals nor the U. S. Attorney's Office have been able to agree on what this statute means. The District Court contradicted itself in its charge concerning what was meant by acting as agent; the District Court and the Court of Appeals dis-

agreed over what is the requisite intent to constitute violation, and the U. S. Attorney's Office disagreed with itself on the requisite intent at the trial and appellate level.

Appellant contended on appeal and did at the trial that the expression that it shall be unlawful for any affiliated person "acting as agent, to accept from any source any compensation * * * for the purchase or sale of any property to or for such registered company" means that the compensation must be accepted while the affiliated person is acting as agent for the purchase or sale of the property to or for the company. That is what the language plainly says, as the Trial Judge twice told the jury in his charge, viz., that Mills must have

> "accepted it when acting as an agent for the company in the purchases" (765)——

and at another point (768) he instructed the jury that in order to convict they must find

> "that when Mills received the claim to compensation he was an affiliated person of either or both the Puritan Fund and Fidelity Trend *and that he accepted the compensation because he acted as an agent of the company in the transactions*" (Emphasis supplied).

At page 767, however, the Trial Judge abandoned this requirement by saying to the jury:

> "The Government does not have to show that Mills actually was influenced by the compensation he received or that as a result of receiving it *Mills caused either of the funds to purchase the notes or influenced others in either of the funds to make such purchase*" (Emphasis supplied).

This was coupled with an instruction that Mills should be found to have acted as agent

> "If the evidence persuades you beyond a reasonable doubt that Mills held a position *where he could influence the purchase of these securities by Puritan Fund or Fidelity Trend Fund and that he was given this compensation because of this position with the intent of influencing him* and that Mills knew that this was the purpose of the compensation • • •" (767) (Emphasis supplied).

At the trial level, the Government's brief in opposition to Deutsch's motion for a new trial (p. 43) stated:

> "The Court *properly* ruled and charged the jury that the Government had to prove that Deutsch gave Mills the compensation because of Mills' position *and with the intent of influencing Mills,* and that Mills accepted it on that basis" (Emphasis supplied).

On appeal, however, the Government reversed its position on this point by stating in its appellate brief (pp. 34-5) that

> "The Government submits, however, that the only intent necessary was intent to give (and accept) a gratuity in appreciation of a past performance by Mills which met with [Deutsch's] satisfaction (*United States* v. *Cohen, supra,* 387 Fed. 2d at 806)."

If this admission had been made at the trial the case would not have gone to the jury insofar as the Puritan purchases are concerned, under the law of case as adopted by the Trial Court.

The Court of Appeals ruled that the Trial Judge was wrong in ruling that, to Mills' knowledge, the alleged compensation must have been given with the intent of influencing him, and to all intents and purposes erased the words "acting as agent" from the statute. It must be borne in mind that the statute forbids "any affiliated person • • • acting as agent, to accept • • • compensation • • • for the purchase • • • of any property • • • for such registered company." The Trial Court rationalized that an affiliated person could be acting as agent in a transaction if he had the power to act as agent even though he did not do so. With even greater intellectual perspicacity, the Court of Appeals concluded that every affiliated person of a registered investment company *ipso facto* acts as agent even though he does nothing provided that he is not acting as broker. The Court of Appeals said (Opinion, pp. 20-21):

> "We believe that the more reasonable interpretation of 'acting as agent' is that it is a descriptive phrase distinguishing affiliated persons acting as brokers from those who are not acting as brokers *in connection with a sale or purchase of securities for an investment company*" (Emphasis supplied).

Clearly a person acting as broker in connection with a sale or purchase of securities for an investment company would have to be the procuring cause of the purchase or sale. It would be a contradiction in terms to say that a person, affiliated or otherwise, could act as broker without a showing that he "took any action as a result thereof" (Opinion, p. 17). In order to be a broker in a transaction he must have effectuated the sale. It is incomprehensible how, in the language of the Court of Appeals which has been quoted, an affiliated person could have been acting as agent "in connection with a sale or purchase of securities for an investment company" without doing the same.

The Court of Appeals opinion continues (p. 21) by stating:

> "In view of our interpretation of the phrase 'acting as agent' we believe that the Trial Court erred in submitting to the jury the issue of whether Mills was acting as agent. As we have indicated, 'acting as agent' does not require a showing that Mills took any action as a result of being compensated. Since Deutsch did not dispute the facts that Mills was an affiliated person and that Mills was not acting as broker, we believe that the Government established, as a matter of law, that Mills was acting as agent for the investment companies within the meaning of §17(e)(1)."

And again (pp. 19-20):

> "Within the statutory scheme of §17(e), affiliated persons are acting either as agents or as brokers. If they are acting as brokers, they may receive limited compensation in connection with portfolio transactions of the registered investment company (15 U. S. C. §80a-17(e)(2) (1964)). If affiliated persons are not acting as brokers, however, they are acting as agents of the investment company and cannot accept compensation in connection with the purchase or sale of securities. While §17(e) is far from a model of clarity, we believe that an affiliated person is acting as agent within the meaning of §17(e) (1) in all cases when he is not acting as broker for the investment company."

A broker acts as agent (*Peo.* v. *Mercer Hicks Corp.*, 4 Misc. 2nd 55, affd. 3 App. Div. 2nd 708). The Court appears to be saying that unless affiliated persons are acting as brokers for which they may receive the limited compensation allowed by this statute, they are acting as agents of the investment company if they do (unlawfully)

what they would have done as brokers if they had acted within the law. That contradicts what the Court said previously about its being unnecessary that affiliated persons shall have taken any action, and inevitably implies that they shall have been the procuring cause or shall have influenced the making of the transaction. They could not be acting "as agents of the investment company • • • in connection with the purchase or sale of securities" (Opinion 17-18) if they engaged in no conduct which connected them with such purchases or sales.

A glance at the statutory definition of "affiliated person", (§80a-2) shows that the Congress could not possibly have intended that, although occupying a purely passive role, any affiliated person could be construed as "acting as agent • • • for the purchase or sale of any property to or for such registered company" merely because he is not acting as broker, regardless of whether he plays any part in the transaction. The definition of affiliated person includes stockholders of five per centum or more of the outstanding voting securities, any officer, director, partner, employee, investment adviser in an investment company or even a depositor in an unincorporated company. If the statute meant, as the Court of Appeals says it does, that anyone of these is to be construed as acting as agent for the investment company in the purchase or sale by it of securities for the reason simply that he is not acting as broker, even though he has no connection with the transaction, the statute would be so vague, amorphous and all embracing that no affiliated person could tell whether he came under its ban if he engaged in any advantageous purchase or sale of a security of the same kind which was owned or acquired by the investment company.

The phrase "acting as agent" is used in subdivision (e)(1) under which petitioner was convicted in juxtaposition to the expression "acting as principal" which is the term employed in subdivisions (a) and (d) of the same

section (15 U. S. C. §80a-17). Quite obviously in order to act as principal in a transaction one has to perform an active role. This is no mere job description. This expression definitely refers to an affiliated person who is acting as principal in the transaction which is condemned. By the same token, in subdivision (e)(1), under which petitioner has been convicted, "acting as agent" requires that the accused shall have been performing the role of agent in the condemned transaction.

Not only would the construction placed on this criminal statute render it so vague as to be totally invalid as a denial of due process under the Fifth Amendment, but its effect would be to negate completely the provision in the Fidelity code of ethics (on which the Court of Appeals and the Government have laid so much stress) (paragraph 3 of Exhibit 1, p. 1 of the Exhibit Volume) that

> "it is considered proper, and in fact, advantageous to such Funds or accounts for any officer or employee to be free to purchase in the market securities generally available to the public, including portfolio securities, provided the purchases are made in the amounts consistent with the normal investment practice of the person involved and with an investment, rather than a trading, outlook. Not only does this policy encourage investment freedom with resulting investment experience, but it should be helpful to such Funds or accounts, by developing a continuing personal interest in such investments by those responsible for the continuous supervision of their portfolios. Furthermore, this is evidence of confidence in the investments made."

As a result of this decision, no officer, employee or other affiliated person in his senses would think of owning any of the same type of securities included in the company's

investment portfolio whether or not they were generally available to the public. The SEC is vested with a great deal of discretionary power in administrative and disciplinary proceedings, but it is not authorized to decide who is or who is not a felon under a federal criminal statute whose coverage is so vague and indefinable that no member of a large class of persons can know whether he is a criminal or not if he engages in a particular course of conduct until the SEC has decided. The law is established by too many authorative decisions to need to cite them that a federal crime must be defined with sufficient clarity so that men of common intelligence are not required to guess at the meaning and that a person must be plainly and unmistakably within the provisions of the statute before he can be punished as a criminal. That has been law in the United States from the beginning until the most recent times. Here, as has been stated, neither the Government, the Trial Judge nor the Court of Appeals could agree on what this statute meant, and the conclusion is clearly erroneous and dangerous that a conviction can be affirmed by, in effect, expunging from the statute its limiting verbiage thus converting it into a broadbanded, dragnet provision the limits of which nobody can understand and subjecting a large class of persons to criminal prosecution if the SEC disapproves of them and considers that they should be indicted.

Only by a tour de force can 15 U. S. C. §80a-17(e)(1) be converted into a mere gratuity statute. When the Congress intended to adopt a gratuity statute it knew how to draft it. Thus 18 U. S. C. §201, which is the classic bribery statute of public officials and witnesses, covers situations where a thing of value is given or promised to a public official with intent to influence an official act (subdivision b) *or* where it is accepted in return for being influenced in his performance of an official act (subdivision

c) *or*—and this is the "gratuity" provision differently phrased under subdivisions (f) through (i):

> "Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official * * * *for or because of* any official act *performed or to be performed* by such public official * * *."

There is no corresponding language in the statute under which petitioner has been convicted. The language and coverage of subdivision (f) are materially different from the language of the other subdivisions and from that of 15 U. S. C. §80a-17(e)(1), and yet the Court of Appeals opinion would seem to blend them all, disregarding differences in meaning so as to consolidate them according to its own ideas of public policy. Congress manifestly intended them to be different. The differences in language render irrelevant the quotation in the Court of Appeals opinion from *United States* v. *Irwin*, 354 Fed. 2d 192, cert. den. 383 U. S. 965, as holding that "it was not necessary to show actual conduct to prove the unlawful payment of a gratuity to a public official under 18 U. S. C. §201 (*f*) (1964): 'It is not necessary for the Government to show that the gift caused or prompted or in any way affected the happening of the official act.'" All of the cases cited in the Court of Appeals opinion on this point were decided under other statutes which are different. It was wrong to group them all together, as though it made no difference how the Congress drafted this type of legislation. It lies neither in the power of the courts, the prosecutor or any administrative agency to redraft criminal statutes to suit their own views of public policy, nor to interchange them to affirm convictions as though it made no difference under which statute a person is indicted. This applies not only to the cita-

tion by the Court of Appeals of *United States* v. *Irwin, supra,* but also of *Howard* v. *United States,* 345 Fed. 2d 126, cert. den. 382 U. S. 838, *Krogmann* v. *United States,* 225 Fed. 2d 220, 225, and *Smith* v. *United States,* 305 Fed. 2d 197, 210, cert. den. 371 U. S. 890, that were cited on the interpretation of the phrase "acting as agent" (Opinion, p. 18) or *United States* v. *Cohen,* 387 Fed. 2nd 803, 806, cert. den. 390 U. S. 996. There is no such language as "acting as agent" in any of the statutes construed by any of those cases, nor anything resembling the structure or other statutory language which is peculiar to §17(e)(1).

Hearsay Evidence of Mills' Concealment of His Purchase Should Not Have Been Admitted to Show Consciousness of Guilt on His Part of This Crime Without Confronting Deutsch With Mills as a Witness for the Prosecution for the Purpose of Cross-examination. This Denied Deutsch His Constitutional Rights Under the Sixth Amendment.

The Court of Appeals appears to have misunderstood this point by characterizing it at page 29 of the opinion as a "claim that evidence of Mills' crime was improperly admitted." Of course it was necessary for the prosecution to prove that Mills was guilty under Count V before Deutsch could be found guilty of aiding and abetting him under Count VI. Petitioner never contended otherwise. What he objects to is the fundamental unfairness of the manner in which the prosecution went about attempting to prove that Mills was guilty on this count. He had testified before the Grand Jury and the SEC to the oral commitment made earlier in the year 1968 in corroboration of the testimony of Deutsch, Karp, and Stein. This testimony was offered in evidence at the trial (403), but was excluded as exculpatory hearsay whereas the allegedly incriminating hearsay was admitted, but the basic constitutional violation consisted in utilizing Mills' hearsay declarations to make him a witness for the prosecution

without affording Deutsch an opportunity to cross-examine him or to elicit from him what he meant by these declarations and conduct. Consciousness of guilt of this crime on Mills' part was by no means the only rational explanation of Mills' wanting to keep this business private. For one thing, he was about to retire and may have wanted to avoid fiduciary problems if after six months he chose to sell ahead of Puritan which perhaps he could have been restrained from doing on account of the fiduciary relationship. This might not have been commendable, and not reporting the purchase was contrary to the Fidelity code of ethics and SEC rules, but the Court of Appeals opinion undiscriminatingly confuses that with being guilty of this statutory crime. Mills was indicted under Count V for violation of §17(e)(1), not for any civil breach of a fiduciary relationship or the violation of a private code of ethics or any rule of the SEC. Still less was Deutsch indicted for aiding and abetting him in that conduct. Deutsch knew nothing about the Fidelity code of ethics nor whether Mills reported his transactoin to the Fidelity management corporation or the SEC, nor Mills' statements to his bank or to Philip Levin's secretary. He should have had opportunity to cross-examine Mills concerning the underlying facts and his reasons for not reporting this transaction, and his statements to officials of the Shawmut bank, and that he wanted his securities carried in a street name to ascertain whether it did evince a consciousness of guilt on his part or something else unrelated to this particular crime. By this strategy, the prosecution gained the benefit of using Mills as a government witness without it being brought out that he had corroborated Deutsch and the other witnesses in his testimony before the Grand Jury and the SEC, and without affording any opportunity to develop that there might well be other reasons for his concealments than a consciousness of guilt of this crime.

Then the prosecution obtained the added bonus, discussed under the next head, of commenting to the jury on Mills' failure to take the stand either in his own or Deutsch's defense, fortified by the highly prejudicial and erroneous instruction of the Court that Mills was not under the control of the prosecution and that the jury could draw whatever adverse inferences it saw fit against Deutsch for not having called Mills as his own witness. This made Mills into a silent witness more effectively than though he had been called to the stand by the Government subject to cross-examination. In *Davis* v. *United States*, 357 Fed. 2d 438, the Court aptly stated:

> "What the jury may infer, given no help from the Court, is one thing. What it may infer when the Court so solemnizes the silence of the accused into evidence against himself is quite another."

The practice of proving a criminal case through hearsay declarations of an accomplice without calling him as a witness and subjecting him to cross-examination has been condemned by the Supreme Court in no uncertain terms (*Pointer* v. *Texas*, 380 U. S. 400, 403; *Douglas* v. *Alabama*, 380 U. S. 415; *Brookhart* v. *Janis*, 384 U. S. 1; *Barber* v *Page*, 390 U. S. 719; *Bruton* v. *United States*, 391 U. S. 123; *Roberts* v. *Russell*, 392 U. S. 293).

In *Douglas* v. *Alabama* (380 U. S. 415) a conviction was reversed in which the prosecution read into the record an alleged confession of a defendant's supposed accomplice, who refused to testify on self-incrimination grounds. The confrontation problem arose because the accomplice could not be cross-examined as to his prior statement. The Court said at pages 419-420:

> "In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-

> examination secured by the Confrontation Clause. • • • Loyd could not be cross-examined on a statement imputed to but not admitted by him. • • • [S]ince [the State's] evidence tended to show only that Loyd made the confession, cross-examination as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself. • • •"
>
> "Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his."

In *California* v. *Green*, 399 U. S. 149, the Court thus characterized the reason for the reversal of the conviction in *Douglas* v. *Alabama*

> "in which the prosecution read into the record an alleged confession of the defendant's supposed accomplice, Loyd, who refused to testify on self-incrimination grounds. The confrontation problem arose precisely because Loyd could not be cross-examined as to his prior statement • • •."

Again, in *Bruton* v. *United States*, 391 U. S. 123, the Court found a violation of confrontation rights in the admission of a co-defendant's confession, implicating Bruton, where the co-defendant did not take the stand. The Court again emphasized that the error arose because the declarant "does not testify and cannot be tested by cross-examination" (391 U. S. at p. 136).

The law was reaffirmed in this respect in *California* v. *Green* (399 U. S. 149) where the language above quoted from *Douglas* v. *Alabama* and *Bruton* v. *United States* is repeated with approval, although the facts in *Green* were sufficiently different to take it outside of the rule.

If the name Mills were substituted for Bruton and Loyd these statements could have been written about the present

case. *Douglas* v. *Alabama* is particularly apposite inasmuch as by claiming his privilege in front of the jury and then being confronted by a previous confession implicating the defendant on trial, Loyd became a silent accusing witness against Douglas whose conviction was reversed for lack of confrontation by Loyd whom Douglas' counsel had no opportunity to cross-examine.

The Government's argument, adopted by the Court of Appeals, is baseless that these alleged admissions by Mills of a consciousness of guilt through concealment were received only against Mills. Everything received against Mills was received against Deutsch, and it implicated Deutsch by implicating Mills. The Court of Appeals said (Opinion, p. 31):

> "The Trial Court's prompt and clear explanation of the limited purpose for which the records were received was sufficient to negate any possibility of prejudice" and "since these documents did not contain any inculpatory statements as to Deutsch, Bruton is not applicable."

The meaning of the words "protective instructions" used in the Government brief is a mystery, since if these alleged admissions by Mills of a consciousness of guilt were to be admitted at all there was not and could not have been any instruction that they were not binding on Deutsch who was the only defendant on trial. Obviously this evidence was offered against Deutsch, and if it were not binding on him it could have been binding on nobody. The apparent confusion, both in the minds of the Court and the prosecutor, is shown by the statement on page 10 of the Government's brief in the Court of Appeals which is copied verbatim at page 31 of the opinion except for a variance in the citation of cases that "the trial court's prompt and clear explanation of the limited purpose for

which the records were received was sufficient to negate any possibility of prejudice. See *United States* v. *Cusumano*, 429 Fed. 2d 378, 381 (2d Cir.), cert. denied *sub nom. Riggero* v. *United States*, 39 U. S. L. W. 3147 (October 6, 1970) (No. 447)." In the *Cusumano* case at page 381, the Court of Appeals said:

> "'The Trial Judge emphasized to the jury that the statement was only binding on the defendant who actually made it * * *. McCarthy's statement did not implicate Riggio, and the risk that the jury might take his lie as doing so falls within the *Bruton* caveat that there are many cases where the jury can and will follow the trial judge's instruction."

The instruction referred to was, of course, the conventional one regarding an admission or confession by an accomplice in a joint trial that it was binding only on the defendant who made it. No such instruction was or could have been given in the case at bar. Mills' guilt or innocense was not *sub judice*, and every alleged admission which was attributed to him was received as binding on Deutsch. Mills' guilt was a link in the chain of evidence necessary to convict Deutsch.

The statement by the Court to the jury "So these exhibits are being offered solely proving that Mr. Mills violated the law" was no protection to Deutsch, Mills' guilt was a condition precedent to Deutsch being guilty, and the only possible purpose of introducing this evidence was to prove that Deutsch was guilty by proving that Mills was.

Neither was such a "protective instruction" any substitute for the right to cross-examine Mills in order to ascertain whether what he said or did betrayed a "consciousness of guilt" on Mills' part of this crime charged

against Deutsch, which was afterwards dismissed against Mills, or whether Mills was guilty of it at all.

Bruton v. *United States* (391 U. S. 123) overruled *Delli Paoli* v. *United States* (352 U. S. 252) insofar as it upheld the effectiveness of an instruction that a co-defendant's confession inculpating the defendant is to be disregarded in determining his guilt or innocence, except where the possibility of prejudice is slight as it was in *Cusumano*. Apparently for that reason, although no such instruction was or could be given here, the Government argued that "The evidence was not directly or 'powerfully' incriminating of Deutsch." That certainly does not sound like the summation of the prosecuting officer at the trial. It would have been news to any of the jurors who sat at the trial to learn that the Government was not contending that this evidence was directly or powerfully incriminating of Deutsch. It was what the jurors were chiefly interested in as their questions indicated that were asked during their deliberations (782).

The Comments by the Prosecutor That Mills Would Have Been Called as a Witness for the Defense If His Testimony Had Been Favorable and the Trial Judge's Instructions That Mills Was Not Under the Control of the Government and That the Jury Could Draw Adverse Inferences Against Deutsch on Account of His Not Calling Mills as a Defense Witness

It was in itself a constitutional and statutory violation for the prosecutor and the Court to comment on Mills' failure to take the witness stand as creating adverse inferences against Deutsch.

If Mills had been on trial this would have been manifestly reversible error. This has been the law in the federal courts at least since the Act of March 16, 1878 (20 Stat. 30, c. 37) which provided that a person charged with the commission of crime may, at his own request, be a competent witness on the trial but that "his failure to make

such request shall not create any presumption against him." Consequently it was held by the Supreme Court in 1893 that all comment upon such failure must be excluded from the jury. (*Wilson* v. *United States*, 149 U. S. 60). In 1965 it was raised to constitutional status and held to be a violation of the Fifth Amendment (*Griffin* v. *California*, 380 U. S. 609).

These basic principles should not be lightly set aside in this case merely for the reason that it was Deutsch not Mills who was on trial. If Mills had not pleaded guilty to Count I, comment on his failure to take the stand could not have been made nor could this have given rise to adverse inferences against either defendant. The circumstance that he did not testify ought not to militate against Deutsch under these circumstances, particularly since it was a derivative criminal liability which was asserted against Deutsch stemming from the allegations that Mills committed the principal crime.

It can hardly be emphasized too strongly that the trial of Deutsch was really a trial of Mills. If, as Count V charges, Mills unlawfully, wilfully and knowingly accepted compensation from Deutsch as an officer of Realty Equities for the purchase of the latter's securities by Puritan or Fidelity Trend Funds, in order to induce him to influence these mutual funds to purchase Realty Equities securities, then it would seem obvious to the jury that Deutsch furnished the compensation to Mills for the same purpose. It was Mills who was really being tried with Deutsch's guilt or innocence depending upon what the jury concluded concerning Mills.

The degree to which Mills was under the control of the Government has been previously mentioned. At the sentencing of Mills, after Deutsch had been tried and found guilty, the following colloquy occurred between the Court and counsel for the parties (939-940):

"The Court: He didn't testify for the government.

"Mr. Naftalis: No, he did not.

"The Court: Judge Botein, do you have anything to say before the Court imposes sentence on Mr. Mills?

"Mr. Botein: Yes, your Honor.

"*I should add at the outset that he was prepared to testify, and had the Government seen fit to call him, he would have continued his cooperation* (Emphasis supplied).

"That is a fair statement, isn't that, Mr. Naftalis?

"Mr. Naftalis: Yes, that is correct, your Honor. We don't take any issue, your Honor, about it at all.

"The Government consents to the dismissal of the open counts as to Mr. Mills.

"The Court: So ordered.

"Mr. Naftalis: Thank you, your Honor.

"Mr. Botein: Thank you, your Honor" (940).

The answering affidavits submitted to the *coram nobis* petition set forth that before Deutsch's trial Mills spent many hours in conference with the prosecuting attorney (1018).

Perhaps the most revealing indication in the record of the extent to which Mills was under the control of the Government at the time of Deutsch's trial is furnished by the memorandum submitted by Mills' counsel to the District Court at the time of his sentencing. This was first disclosed to petitioner or his attorney in part by the quotation made from it in the Government's brief to the Court of Appeals, and still later the entire pre-sentence memorandum was disclosed which shows beyond peradventure how constrained Mills felt to help the Government against Deutsch to protect his own liberty.

If the statement were correct (which is highly questionable) in the footnote at page 46 of the Government's brief in the Court of Appeals that Mills' testimony "would have constituted a refutation of his earlier SEC and Grand Jury testimony", which supported Deutsch's version of the transaction and is callously claimed by the Government to have been fabricated to cover up this alleged criminal malfeasance, then why did Mills hasten to the U. S. Attorney's Office to repudiate his defense to Count V of this indictment which was still pending against him, and subject himself to possible prosecution for perjury as well? He could not help the Government prosecute Deutsch except by implicating himself in the main crime (Count V) in the commission of which Deutsch was charged with having aided and abetted. Strange it was, indeed, if Mills felt no need for "cooperation" with the Government, if he was under no pressure and relied on no agreement with the prosecution, express or implied, that he would receive leniency if he did not testify favorably to Deutsch's defense, that he would have voluntarily assumed to disclaim his prior sworn testimony before the SEC and the Grand Jury, voiding his previous defense to a count in the indictment which was still pending, and running the risk of being indicted for having perjured himself in giving under oath this previous testimony before the Grand Jury and the SEC. Yet the Trial Court solemnly told the jury that as matter of law Mills was not in the control of the Government, and that they could draw whatever inferences they saw fit adverse to Deutsch from the circumstance that Deutsch's counsel had not seen fit to call him as a witness, thus vouching for his credibility notwithstanding the pressures exerted upon him by the Government.

Since it was Mills' guilt which was being tested at Deutsch's trial, no comment should have been allowed upon his failure to take the stand particularly where, for reasons unknown to the jury, it was in Mills' interest to

implicate Deutsch and exonerate himself which, paradoxically, could only be done by implicating himself in reliance upon the agreement mentioned by the Judge at the *coram nobis* argument that Mills would not be prosecuted for doing what he had to have done if Deutsch were to be convicted.

The Dismissal on the Merits of Count V Against Mills and the Judgment of Conviction Entered Against Him Under Count I Constitute a Bar by Res Judicata or Collateral Estoppel to the Prosecution of Petitioner Under Count VI

Only "an affiliated person" of a registered investment company can be guilty of any of the crimes created by the Investment Company Act of 1940 (USC §80a-17). Mills was an affiliated person of Puritan and Fidelity Trend Funds at the time in question. Deutsch was not. Deutsch could be convicted only under 18 U. S. C. 2 of aiding and abetting Mills. In this instance the primary offense was committed by Mills or by no one. Unless Mills is guilty, no crime was committed by any person (cf. *Von Patzoll* v. *United States*, 163 Fed. 2d 216, cert. den. 232 U. S. 809).

Where, as here, no crime was committed unless by the person charged with having been the primary wrongdoer, and the latter has been exonerated, it operates by way of *res judicata* or (more correctly) collateral estoppel to prevent the conviction of the person charged with having aided and abetted in the commission of the crime (*U. S.* v. *Pyle*, 279 Fed. 290) cited with approval in *United States* v. *Tornabene* (222 Fed. 2d 875, 878) and *Giraglosian* v. *United States* (349 Fed. 2d 166, 167). In *Pyle*, as here, the person charged with having been the aider and abettor could not be convicted unless the other had committed the crime, and the charge of aiding and abetting was dismissed on the law on account of the acquittal of the primary wrongdoer. The Court said (p. 297):

> "In this unlawful and criminal conduct, however, under the verdict of the jury herein, it is conclu-

> sively established as matter of law that the defendant Pyle, the only officer or attache of the bank named, did not participate."

Since under that criminal statute (§5209 of the Revised Statutes) only an officer or agent of a national bank could be guilty, the alleged aider and abettor (as here) was incapable of committing the main crime and, although in that case he might have been convicted of a different crime under a state statute, the federal charge under §5209 was dismissed on the law. *Res judicata* and collateral estoppel are applied to criminal as well as civil proceedings (*Sealfon* v. *United States*, 332 U. S. 575, 578).

In the present instance, Mills did not stand trial and thus was not acquitted under Count V by the verdict of a jury. Nevertheless on account of the dismissal of Count V against him under the circumstances of this case, he could never again be prosecuted thereunder (947). "An unqualified dismissal by the prosecuting attorney of an indictment at one term of court constitutes a termination of the prosecution precluding reinstatement of the case on motion at the next term. It immediately frees the defendant" (21 Am. Jur. 2d pp. 503-504).

It has been said that "a plea of guilty * * * is as conclusive as a verdict of a jury * * *" (21 Am. Jur. 2d pp. 483-4). Notwithstanding that the evidence at Deutsch's trial exonerated Mills under Count I, his plea of guilty thereto stands as a judgment which excludes his being guilty under Count V since the two crimes are inconsistent. The situation is not unlike that where a conviction of criminally concealing and withholding stolen property is dismissed as barred by a conviction of larceny for the reason that the two crimes are mutually exclusive (*People* v. *Daghita*, 301 N. Y. 223). The Court there said (p. 228):

> "A defendant may, of course, be indicted for both * * * and it is for the jury to determine whether he

is guilty as a thief of the larceny or as a non-thief of concealing and withholding. In the case before us, the Trial Court erred in permitting the jury to convict the defendant of both."

See, also, *Mercer* v. *Commonwealth* (Ky. 330 S. W. 2d 734, 99 A. L. R. 2; annot. 82 A. L. R. 2d 584).

Under such circumstances, "he may not be convicted of both crimes" (*People* v. *Moro*, 23 N. Y. 2d 496, 500).

Count I of this indictment is under §80a-17 (d) which provides that "It shall be unlawful for an affiliated person of * * * a registered investment company* * * *acting as principal* to effect any transaction in which such registered company * * * is a joint or joint and several participant * * * with such affiliated person, * * *." Count I charges that Mills so acted "as principal" to effect the purchase himself of the Realty Equities' note with warrants attached in which Puritan (of which he was an affiliated person) was alleged to have been a joint and several participant (Emphasis supplied). Count V, upon the other hand, charges that Mills made the same purchase *"while acting as agent"* for the Puritan and Fidelity Trend Funds (Emphasis supplied). Mills could not have made this purchase both while acting as principal and likewise while acting as agent. The one excludes the other. Mills' sentence on Count I amounts to a judgment determining him to have been guilty of a statutory crime which is inconsistent with and precludes his being guilty of the charge under Count V which is a condition precedent to guilt on the part of Deutsch.

The Court of Appeals misconceived this point by stating that it is not incumbent upon the prosecution to prove that the principal has been either convicted or acquitted of the offense. That statement is true as far as it goes, but it is

otherwise where, as shown above, it has been adjudicated that the main crime was not committed.

The crime charged under Count V was committed by Mills or it was committed by nobody. There has been an adjudication that Mills did not commit it. Since it has thus been adjudged that this crime was not committed by anybody, Deutsch could not be convicted of having aided and abetted in its perpetration.

Insufficient Evidence to Establish Guilt Beyond a Reasonable Doubt

It was error to hold that there was sufficient evidence as matter of law for submission to the jury on the charge that Mills accepted or that Deutsch paid to him "compensation * * * for the purchase * * * of * * * property" by Puritan or by Fidelity Trend within the meaning of 15 U. S. C. §80a-17(e)(1).

CONCLUSION

The questions involved herein are of great importance in the administration of criminal justice and in the interpretation of the Investment Company Act. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Tel. 962 0330

Dated: October 18, 1971

JEROME DEUTSCH
Petitioner

Certification

State of New York
County of New York—ss.:

JEROME DEUTSCH, being duly sworn, deposes and says that he is the petitioner in the above entitled petition; that he has read it and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JEROME DEUTSCH

Subscribed and sworn to
before me this 18th day
of October, 1971

CARL P. RAGAZZO
Notary Public, State of New York
No. 41-8482025
Qualified in Queens County
Cert. filed Queens Co. Clk's & Reg Off.
Commission expires March 30, 1972

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 995, 996—September Term, 1970.

(Argued August 9, 1971 Decided September 21, 1971.)

Docket Nos. 35468, 71-1180

UNITED STATES OF AMERICA,

Appellee,

v.

JEROME DEUTSCH,

Appellant.

Before:

FEINBERG, MULLIGAN and TIMBERS,

Circuit Judges.

Appeals (1) from a judgment of conviction after jury trial in the Southern District of New York, Charles M. Metzner, *District Judge,* for aiding and abetting an affiliated person of registered investment companies in receiving compensation for the purchase of securities for such investment companies, in violation of Section 17(e)(1) of the Investment Company Act of 1940, 15 U.S.C. §80a-17(e)(1) (1964), and of the Aider and Abettor Statute, 18

U.S.C. §2 (1964); and (2) from an order of Judge Metzner denying a writ of error *coram nobis*.

Affirmed.

JOHN VAN VOORHIS, New York, N. Y., *for Appellant.*

JACK KAPLAN, Asst. U. S. Atty., New York, N. Y. (Whitney North Seymour, Jr., U. S. Atty., Jay S. Horowitz, Richard J. Davis and Ross Sandler, Asst. U. S. Attys., New York, N. Y., on the brief), *for Appellee.*

TIMBERS, *Circuit Judge*:

This appeal presents questions of first impression under the Investment Company Act of 1940 (the Act). It involves the first criminal prosecution charging violations of §17(e)(1) of the Act, 15 U.S.C. §80a-17(e)(1)(1964), during the thirty years the Act has been on the books—willful violations of the Act being punishable by a fine of not more than $10,000 and/or imprisonment of not more than two years. 15 U.S.C. §80a-48 (1964).

Jerome Deutsch appeals from a judgment of conviction entered upon a jury verdict after a six day trial in the Southern District of New York, Charles M. Metzner, *District Judge,* finding him guilty, in violation of 18 U.S.C. §2 (1964), of aiding and abetting one Frank D. Mills in knowingly accepting compensation from the issuer of certain securities while Mills was acting as agent for certain registered investment companies, in violation of 15 U.S.C. §80a-17(e)(1)(1964). Deutsch also appeals from Judge Metzner's order denying his post-conviction motion for *coram nobis* relief. Finding no error, we affirm.

Opinion, United States Court of Appeals, Second Circuit

Offenses Charged

Deutsch was tried on one count of a seven-count indictment charging violations of §17 of the Act, 15 U.S.C. §80a-17 (1964),[1] and of 18 U.S.C. §2 (1964).

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1 Sections 17(d) and (e) of the Investment Comapny Act of 1940, 15 U.S.C. §§80a-17(d) and (e) (1964), provide:

"(d) It shall be unlawful for any affiliated person of or principal underwriter for a registrant investment company (other than a company of the character described in section 80a-12(d)(3) (A) and (B) of this title), or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant. Nothing contained in this subsection shall be deemed to preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

(e) *It shall be unlawful for any affiliated person of a registered investment company*, or any affiliated person of such person—

(1) *acting as agent to accept from any source any compensation* (other than a regular salary or wages from such registered company) *for the purchase* or sale *of any property* to or *for such registered company* or any controlled company thereof, except in the course of such person's business as an underwriter or broker; or

(2) acting as broker, in connection with the sale of securities to or by such registered company or any controlled company thereof, to receive from any source a commission, fee, or other remuneration for effecting such transaction which exceeds (A) the usual and customary broker's commission if the sale is effected on a securities exchange, or (B) 2 per centum of the sales price if the sale is effected in connection with a secondary distribution of such securities, or (C) 1 per centum of the purchase or sale price of such securities if the sale is otherwise effected unless the Commission shall, by rules and regulations or order in the public interest and consistent with the protection of investors, permit a larger commission." (Italicized provisions are those directly involved herein.)

Counts One and Two charged Deutsch's co-defendant, Frank D. Mills, with knowingly effecting purchases of securities for his personal account and for the accounts of two registered investment companies of which he was an affiliated person, Puritan Fund, Inc. and Fidelity Trend Fund, Inc., in violation of §17(d) of the Act, 15 U.S.C. §80a-17(d) (1964). Counts Three and Four charged Deutsch with aiding and abetting these crimes, in violation of 18 U.S.C §2 (1964).

Count Five charged Mills with knowingly accepting compensation from Realty Equities Corporation in New York, the issuer of the securities, while Mills was acting as agent for the registered investment companies, in violation of 15 U.S.C. §80a-17(e)(1) (1964). Count Six charged Deutsch with aiding and abetting this crime.

Count Seven charged both defendants with use of the mails in making false statements and omitting material statements regarding the transactions between Realty Equities and the investment companies with which Mills was affiliated, in violation of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1964), and of 18 U.S.C. §2 (1964). The government consented to a dismissal of Count Seven prior to trial.

Mills pleaded guilty to Count One on April 7, 1970. After Deutsch's trial, Mills was fined $7,500 on May 19, 1970, and Counts Two and Five were dismissed. Trial of Deutsch alone commenced April 20 and ended April 27, 1970. Counts Three and Four were dismissed at the close of the government's case. The jury found Deutsch guilty on the remaining count, Count Six. Deutsch was fined $10,000 on August 4, 1970.

Transactions Underlying Offenses Charged

Before discussing the claims raised on appeal, a narration of the events beginning in the summer of 1967 and

culminating in the indictment returned April 11, 1969 is necessary to an understanding of the rather sophisticated crimes with which Mills and Deutsch were charged. Upon the record before us, the jury could have found as follows.

During the summer of 1967, Deutsch was executive vice-president and a member of the three-man board of directors of Realty Equities Corporation in New York, a real estate investment company listed on the American Stock Exchange. Realty had been founded by Deutsch and others in 1959. By 1968 it had consolidated assets of $137 million.

In the summer of 1967, Realty anticipated a forthcoming merger in connection with which it needed to raise a substantial amount of capital. Realty decided to finance the merger by a private placement, limited to institutional investors only, of $12 million in promissory notes with warrants attached. This security was to be issued in units of $500,000. Each unit was to consist of a $500,000 7½% 15-year promissory note, a warrant for the purchase of 37,500 shares of Realty stock at a gradually ascending price, and the right to use the note in lieu of cash when exercising the warrant. The purchase price of the unit was to be the face amount of the note. The initial exercise price of the warrant was to be the market price of Realty stock on the day before the first closing.

Deutsch was in charge of selling the issue. His initial efforts met with failure. As of December 4, 1967, he had not succeeded in selling a single note. While peddling this issue, however, Deutsch had his first contact with the co-defendant, Frank D. Mills, a contact which resulted in the first sale of Realty notes.

During the summer of 1967 and throughout 1968, Mills was a senior officer of Fidelity Management and Research

Company in Boston, and of twelve affiliated mutual funds for which it acted as investment adviser. Mills was a member of the six-man investment committee of all the funds, whose aggregate assets exceeded $3.5 billion and whose combined stockholders numbered over 500,000. As such, he participated in the preparation of periodic guidelines listing securities and maximum dollar values which the fund account managers could buy or sell without approval; he also was one of the two men whose approval was needed for any transaction outside the guidelines. Mills was the account manager of one of the funds, the Puritan Fund, and, as such, he had authority to buy or sell up to $2 million in any bond and up to the guideline limits for approved stocks. Mills also was vice-president of eight of the funds, including Puritan Fund and Fidelity Trend Fund. It is undisputed that Puritan and Fidelity Trend were registered investment companies and that Mills was an affiliated person of each of them within the meaning of the Act. 15 U.S.C. §§80a-2(3), 80a-3, 80a-8 (1964).

Deutsch's first contact with Mills occurred as a result of Deutsch's attempt, in the summer of 1967, to sell some of the issue to Massachusetts Mutual Life Insurance Company in Boston. Homer Chapin, executive vice-president in charge of investments, was also a director of Fidelity Management and the chairman of its investment committee. He told Deutsch that state insurance law barred Massachusetts Life from purchasing that type of security; but a few days later, Chapin recommended the issue to Mills, saying that from what he knew Realty was satisfactory in every way and that if he were interested he should contact Deutsch directly. The first sale of Realty notes ensued.

On December 8, 1967, Mills committed the Puritan Fund to purchase two notes. The first sale appeared to be the

shot in the arm that Realty needed. With Milis' permission, Deutsch used Puritan's prestigious name in talking to prospective buyers. As Deutsch testified at trial, this was "a good sales pitch" and "very helpful." The entire offering was soon fully subscribed, and an additional $5 million in notes was authorized. This offering, too, was fully subscribed, with Puritan itself taking an additional $700,000 on June 14, 1968, bringing its investment up to the statutory limit of 10% of the offering. By August 9, 1968, Realty had thus succeeded in borrowing $17 million.

On August 29, 1968, Deutsch again called Chapin who had recently joined Realty's board of directors at Deutsch's invitation. Realty had contracted to repurchase five units from Republic National Life Insurance Company in Texas, one of the orignal subscribers, and had an option to repurchase seven more, the balance of Republic's interest, at prices which were advantageous in view of an appreciable rise in the market price of Realty stock.[2] Meanwhile, Massachusetts law had changed, and the notes were now permissible purchases for insurance companies. Deutsch was thus able to offer to sell Massachusetts Life some of the Republic National Life units. Deutsch did not disclose the repurchase contract between Realty and Republic National Life. He led Chapin to believe that the seller was

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2 From February through November, 1968, Realty stock was traded on the American Stock Exchange at the following prices:

	High	*Low*
February	20⅛	16⅛
March	18⅜	16⅛
April	20⅜	15¾
May	24⅛	19½
June	28⅛	22⅝
July	28¼	24⅜
August	31⅝	24⅝
September	32¾	30⅛
October	35½	29⅝
November	34½	30

Republic National Life and that the price had not yet been negotiated. Deutsch pointed out to Chapin that the exercise price was 15¼ whereas the stock was trading at 32. Chapin said he was interested and asked for more information.

On September 11, Richard Dooley, a Massachusetts Life securities analyst to whom Chapin had referred the matter, told Deutsch that Massachusetts Life was rejecting the offer because of house counsel's opinion that the price was so advantageous it gave the transaction the appearance of being a corporate gift in view of Chapin's interlocking directorships.[3] Deutsch renewed the offer at a higher price, 7¾ premium per warrant instead of 3, saying that it brought the price into line with what he was told was the customary discount.[4] Counsel for Massachusetts Life still thought the price was too advantageous. On September 25, Dooley relayed his company's final rejection.

Some time between September 23 and September 26, Chapin told Mills about Realty's exceptional offer and sug-

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3 On September 4, 1968, Deutsch told Chapin that the resale price of the notes had not yet been fixed, but that he thought Republic National Life would charge a relatively small premium for the warrants. A few days later, in a telephone conversation with Dooley, Deutsch said the premium to be charged was $3 per share, so that the effective conversion price would be 18¼. Dooley, aware that the stock was trading at 30¼, calculated that on a $1 million note the company would make an immediate paper profit of $900,000, and recommended purchase of what he thought was an exceptional bargain. It was the size of this "profit" which made house counsel reject the tempting offer.

4 Deutsch may have had ulterior motives in making this strenuous effort to sell the Realty securities to Massachusetts Life at such an advantageous price. During the negotiations, Deutsch explained to Richard Dooley why he was offering this exceptional bargain to Massachusetts Life. Dooley testified at trial that Deutsch told him:

> "Mass. Mutual and Realty Equities had a good business relationship, that he hoped this would continue, that the Realty Equities people loved Homer Chapin, that he hoped by extending this possible investment to us it would cement our relations over a period of time."

gested that Mills call Deutsch. However, unknown to Chapin, Mills already knew about Deutsch's offer and had taken steps to seize the opportunity for himself. On September 16, five days after the initial rejection by Massachusetts Life, Mills had approached the president of the National Shawmut Bank in Boston for the purpose of borrowing enough cash to buy a unit of the Realty securities for himself.

Mills told the bank that he wanted the transaction kept strictly confidential. To insure confidentiality, Mills asked the bank to make an exception to its general practice and to place the transaction in a nominee account. Shortly after September 24, the bank agreed to lend Mills $572,000 as the entire purchase price of a unit.

On September 30, a few days after the Shawmut Bank agreed to lend Mills the $572,000, the Banque de Paris bought two identical units from Republic National Life at a price per unit of $928,125.

Some time in early October, Mills took two steps with respect to Realty securities. First, he gave a 50% participation in his private deal with Realty to a real estate investor named Philip Levin.[5] Second, he tried unsuccessfully to interest Richard Smith, the account manager of one-half of Fidelity Trend, to buy two notes for the fund.

On October 15, after his unsuccessful approach to Richard Smith, Mills approached the account manager of the

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5 Levin estimated that the date upon which Mills first offered him half a note was "approximately" August 1968. Deutsch argues that Levin's testimony supports his contention that he, Deutsch, had made a commitment to sell a note to Mills in February or March 1968. There was evidence, however, from which the jury could have found that Levin was mistaken about the date. If Mills had approached Levin in August, why would Mills ask the Shawmut Bank for a loan to finance the purchase of an entire unit on September 16? Moreover, Mills did not inform the bank until October 17 that he would require only half the money since he was buying only half the unit.

other half of Fidelity Trend, Ross Sherbrooke. Mills said two units would be available for a little over $900,000 per unit, but that there was some urgency and that Sherbrooke had to make up his mind by October 17, after which the notes would no longer be available. Mills did not disclose that he and Levin were about to buy a unit themselves at a substantially lower price. On the same day, Mills told the Shawmut Bank that he was ready to proceed with the loan and would require only half the money since he was buying only half the unit.

Mills undoubtedly was influential in Sherbrooke's decision to buy the Realty notes.[6] Sherbrooke had never heard of Realty before. He looked up the company in standard reference books, asked a Fidelity specialist about it, and a day or so later told Mills he would take the two units. Mills was considerably senior to Sherbrooke. Since Sherbrooke had been on the job for only four months, he may well have been reluctant to reject his senior's suggestion. Sherbrooke at trial conceded that Mills' high opinion of Realty played a "significant role in influencing my judgment":

> "I relied on Mr. Mills, on his judgment as one who knew the company better than I and who had some dealing with the security and the company through the ownership in Puritan Fund, and I regarded him as being knowledgeable on the subject and on the company, and to that extent I relied on him."

Mills' and Levin's purchase and Fidelity Trend's purchase closed three days apart. Mills and Levin paid

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6 Mills actually was one of the two members of the investment committee who approved the transaction. This approval, however, was not technically necessary. Sherbrooke sought approval even though he did not need it, because he had been on the job for only four months and the investment was out of the ordinary.

$537,000 for one unit on October 21; Fidelity Trend paid $928,125 per unit for two units—a total of $1,856,250—on October 24.

After his purchase was made, Mills continued to try to conceal the transaction. In violation of the Fidelity group's internal code of ethics, Mills did not report his purchase of the Realty note. Moreover, Mills had not requested advance approval of the transaction from the SEC, in violation of the regulations governing joint and several transactions of an affiliated person such as Mills and a fund such as Fidelity Trend. 15 U.S.C. §80a-17(d) (1964); 17 C.F.R. §270.17d-1 (1971).

Deutsch also tried to conceal the transaction. He insisted that Levin use a nominee. When called before the SEC on November 22, 1968, he falsely testified that the two nominees were "two banks in the United States", when in fact Levin's nominee was Saul and Co. and Mills' nominee was Harris and Co. Deutsch also supplied the SEC with what he said was an office memorandum listing all subscribers and purchasers at resale. With respect to other nominees, this memorandum indicated the real parties in interest in parentheses; but with respect to Mills' and Levin's nominees, the real parties were not indicated.

At trial, the main thrust of Deutsch's defense was that he had agreed to sell a Realty note to Mills in February or March 1968 and that the actual sale the following October was the fulfillment of a promise made at a time when Deutsch had no idea that the notes would be worth so much more than face value.

Deutsch testified that on February 29, 1968, after the closing of the sale of two Realty notes to Puritan, Mills told him he wanted personally to buy a note; that the next day, Deutsch told Realty's president, Morris Karp, about Mills' request and that Karp said it could not be done on

original issue, but that Mills could purchase one of the notes on re-sale; and that several weeks later, near the end of March, Deutsch told Mills, "I got approval from Morris that if there is ever a resale you can have it for whatever price we get it for," to which Mills' response was, "Great. You got a deal."

Despite Deutsch's customary practice of making notes on his way home from negotiations, he made none of this commitment. His promise was not reflected in any contemporaneous writing. Moreover, this alleged oral agreement was not binding on Realty. See N. Y. Uniform Commercial Code, §§8-319 and 2-201 (McKinney 1964).

Morris Karp, Realty's president, and David Stein, Realty's counsel, testified on Deutsch's behalf. While their testimony generally corroborated that of Deutsch, several inconsistencies between their testimony and Deutsch's could have led the jury to disbelieve Deutsch's story of the February-March commitment.

Claim That Trial Court Misinterpreted §17(e)(1) of the Act

The essential issues on this appeal require interpretation of §17(e)(1) of the Act, 15 U.S.C. §80a-17(e)(1) (1964). While this is the first criminal prosecution under §17(e)(1), the SEC has had occasion at the administrative level to construe this section of the statute.[7] Prior to the instant

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7 Some of the SEC's more recent decisions involving §17(e)(1) are: *Cornfield*, Securities Exchange Act Release No. 9091 (March 1, 1971); *Provident Management Corporation*, Securities Exchange Act Release No. 9028 (December 1, 1970); *Dishy, Easton and Company*, Securities Exchange Act Release No. 8702 (September 23, 1969); *Consumer-Investor Planning Corporation*, Securities Exchange Act Release No. 8542 (February 20, 1969); *Imperial Financial Services, Inc.*, Securities Exchange Act Release No. 7684 (August 26, 1965).

case, however, no court, so far as we know, has discussed the intent of Congress in enacting §17(e)(1).[8]

Unfortunately, the legislative history affords little help in our present task of construing §17(e)(1). While enactment of the Act was preceded by lengthy hearings,[9] the section in question was explained only once during these proceedings, and this brief comment sheds little light on Congressional intent.[10] The Senate and House Reports on the Act [11] also fail to deal specifically with §17(e)(1). Congress did set forth in the Act a declaration of Congressional policy and specific findings, based on the SEC Report mentioned below. Section 1 of the Act, 15 U.S.C. §80a-1 (1964).

The Act resulted from a four-year study of the investment company industry by the SEC.[12] The SEC Report

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8 In *Entel* v. *Guilden*, 223 F. Supp. 129 (S.D.N.Y. 1963), *aff'd sub nom. Neuwirth* v. *Allen*, 338 F.2d 2 (2 Cir. 1964), the court decided that §17(e) of the Act created a private right of action for the benefit of an investment company and that the right could be exercised secondarily by holders of perpetual warrants issued by the investment company. The court, however, did not attempt to unravel the proper meaning of §17(e)(1).

Several district courts also have entered decrees enjoining violations of §17(e), but they have not attempted to construe that section of the Act. See *SEC* v. *Bernhard & Co.*, Current CCH Fed. Sec. L. Rptr. ¶93,059 (S.D.N.Y. May 26, 1971); *SEC* v. *Commonwealth Security Investors, Inc.*, [1969-1970 Transfer Binder] CCH Fed. Sec. L. Rptr. ¶92,859 (E.D. Ky. October 21, 1970).

Our Court has dealt with other subsections of §17: *SEC* v. *Sterling Precision Corporation*, 393 F.2d 214 (2 Cir. 1968) (§17(a)(2)); *SEC* v. *Talley Industries, Inc.*, 399 F.2d 396 (2 Cir. 1968) (§17(d)). But these opinions do not help us in interpreting §17(e)(1).

9 *Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. (1940) (Senate Hearings); *Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 3d Sess. (1940) (House Hearings).

10 This comment occurred during the Senate Hearings, *supra* note 9, at 262, and is set forth at p. 11, *infra*, of this opinion.

11 S. Rep. No. 1775, 76th Cong., 3d Sess. (1940) (Senate Report); H.R. Rep. No. 2639, 76th Cong., 3d Sess. (1940) (House Report).

12 SEC Report on the Study of Investment Trusts and Companies (SEC Report). The SEC Report was issued in five parts: *The Nature, Classifi-*

depicted fantastic abuse of trust by investment company management and wholesale victimizing of security holders. The Act evolved from a bill which was based on the conclusions and recommendations of the SEC Report. After hearings had been held on a bill drafted by the SEC, the industry and the Commission worked out a compromise bill which passed without a dissenting vote.[13]

The Senate and House Reports indicate that the Act was designed primarily to correct the abuses of self-dealing which had produced injury to stockholders of investment companies.[14] Four sections of the Act, including §17, were aimed specifically at insuring the independence of management and its fidelity to stockholders.[15] Congress recognized that its existing laws were inadequate to prevent the abuses of self-dealing. Several times during the hearings, Senators questioned SEC attorneys on their inability to obtain

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cation and Origin of Investment Companies, H.R. Doc. No. 707, 75th Cong., 2d Sess. (1939); *Statistical Survey of Investment Trusts and Investment Companies*, H.R. Doc. No. 70, 76th Cong., 1st Sess. (1939); *Abuses and Deficiencies in the Organization and Operation of Investment Trusts and Investment Companies*, H. R. Doc. No. 279, 76th Cong., 2d Sess. (1940); *Control and Influence Over Industry and Economic Significance of Investment Companies* and *Conclusions and Recommendations*, H.R. Doc. No. 246, 77th Cong., 2d Sess. (1942).

13 For a discussion of the events leading to the enactment of the Act and about the Act generally, see Motley, Jackson and Barnard, *Federal Regulation of Investment Companies Since 1940*, 63 Harv. L. Rev. 1134 (1950); Jaretzki, *The Investment Company Act of 1940*, 26 Wash. U. L. Q. 303 (1941); *Comment*, 50 Yale L.J. 440 (1941).

14 The Senate Committee on Banking and Currency reported:

> "Basically the problems flow from the very nature of the assets of investment companies. The assets of such companies invariably consist of cash and securities, assets which are completely liquid, mobile and readily negotiable. Because of these characteristics, control of such funds offers manifold opportunities for exploitation by the unscrupulous managements of some companies." Senate Report, *supra* note 11, at 6. See also *id.* at 7.

15 The others were Sections 9, 10 and 16, 15 U.S.C. §§80a-9, 10 and 16 (1964).

convictions, thus evincing a concern about the difficulties of obtaining convictions for abuse of trust in the investment company industry.[16] At one point, David Schenker, Chief Counsel of the SEC Investment Trust Study and one of the drafters of the Act, said:

> "When you deal with investment companies, because of the peculiar nature of their assets—they deal in securities—it is difficult to convince a jury in certain situations. We tried to set forth broad standards to prohibit transactions like the ones that have been recounted, because we knew the difficulty of trying to convince a jury of larcenous intent and conspiracy." Senate Hearings, *supra* note 9, at 131.

The Act was thus designed in part quite clearly to establish broad standards which would more easily enable the government to convict affiliated persons for self-dealing in the management of investment companies—an industry the very nature of which made it particularly difficult to gather proof.

Interpretation of the Phrase "Acting as Agent"

Section 17(e)(1), so far as here relevant, provides as follows: "It shall be unlawful for any affiliated person of a registered investment company, . . . acting as agent, to accept from any source any compensation . . . for the purchase . . . of any property . . . for such registered company. . . ."

Deutsch does not dispute the fact that Mills was an affiliated person within the meaning of the Act and that Puritan and Fidelity Trend were registered companies. He contends, however, that the trial court misconstrued the phrase "acting as agent." He argues that this phrase makes

16 See Senate Hearings, *supra* note 9, at 131 and 971.

the violation proscribed by §17(e)(1) incomplete unless the compensation actually caused a fund to purchase or sell securities. The trial court rejected Deutsch's proposed construction and charged the jury that:

> "The Government does not have to show that Mills was influenced by the compensation he received or that as a result of receiving it Mills caused either of the funds to purchase the notes or influneced others in either of the funds to make such purchase."

Moreover, the trial court, interpreting the phrase as being merely descriptive of a subclass of affiliated persons, instructed the jury on the element of acting as agent in the following manner:

> "You may find that he acted as an agent if you determine that he had the power to make investment decisions for Puritan Fund at the time of its purchases or that as a result of his position in the company he could influence the decisions regarding the purchases by Fidelity Trend of Realty Equities notes."

We believe that the trial court's interpretation of the phrase "acting as agent" was incorrect but that, if anything, it imposed a greater burden on the government in proving its case than was necessary and therefore Deutsch was not prejudiced.

Section 17(e)(1) does not explicitly make it an element of the offense that the recipient of the compensation take any action as a result thereof. Deutsch argues that the draftsman's use of a verb in the phrase "acting as agent" expresses a Congressional intent to prohibit only gratuities which succeed in influencing the recipient's conduct. We find it hard to believe, however, that a Congress which had recognized that the investment company industry "offer[ed]

manifold opportunities for exploitation by unscrupulous managements . . . . ," Senate Report, *supra* note 11, at 6, meant that an offense was complete only when the affiliated person acted as a result of receiving something of value. Rather, we believe that the more reasonable interpretation is that an offense under §17(e)(1) is complete when the compensation is delivered and received with the forbidden intent. The objective of §17(e)(1) is to prevent affiliated persons from having their judgment and fidelity impaired by conflicts of interest. It is clear that, as soon as Mills purchased the Realty note at a reduced price, he was inhibted by a conflict of interest which could easily becloud his judgment to the detriment of the beneficiaries of the funds. The abuse which §17(e)(1) was designed to prevent —affiliated persons operating under conflicts of interest— was complete when Mills received the compensation, even if he never exerted any influence on Realty's behalf. Moreover, to accept Deutsch's construction would emasculate §17(e)(1). Given the nature of the investment company industry, it would be extremely difficult to prove that the payment of compensation actually caused a particular purchase. It is most unlikely that Congress intended a construction which would rob §17(e)(1) of its effectiveness.

Our interpretation of the phrase "acting as agent," namely, that it is a descriptive phrase and does not require a showing that the recipient of the compensation took any action as a result thereof, appears to be buttressed by the SEC's administrative views. In *Provident Management Corporation, supra* note 7, the SEC found a violation of §17(e)(1) when an investment adviser to a registered investment company retained fees which rightfully belonged to the company. On three occasions, when the investment company tendered its holdings of securities in certain companies pursuant to public tender offers, Porteous, the president of the investment adviser, caused his company to be

designated as soliciting agent and received and retained approximately $42,000 in tender fees from those inviting the tenders. The SEC held that the retention of the tender fees by Porteous constituted an impermissible form of compensation derived from the investment company's portfolio transactions. In so holding, however, the Commission did not find that the retention of the tender fees had caused Porteous to take any improper action. Instead, the mere retention of the fees constituted a violation of §17(e)(1), because the SEC recognized that to permit the investment adviser to retain the fees would create a conflict of interest which might influence the adviser's future advice to the investment company: "To countenance such conduct would permit the determination whether an investment company's portfolio securities should be tendered to be influenced by considerations relating to the affiliate's compensation, and thereby create a conflict of interest between those acting in a fiduciary capacity for the investment company and the fund." *Id.* at 9.

Similarly, in *Imperial Finance Services, Inc., supra* note 7, the SEC found that actual conduct as a result of being compensated was not an essential element of the offense proscribed by §17(e)(1). There the SEC held that it was a violation of §17(e)(1) for an officer of an investment adviser to an investment company to buy securities at a discount from a broker-dealer, because the officer "was in a position to influence" the choice of broker-dealers who would be granted business through transactions in the investment company's portfolio securities. *Id.* at 10. See also *Consumer-Investor Planning Corporation, supra* note 7. It is true that in the latter two cases the affiliated person probably acted as a result of receiving compensation, but the opinions do not turn on this.

Our interpretation of the phrase "acting as agent," that it is not necessary to show actual conduct as a result of

the compensation, further appears to be consistent with decisions of this Court and of other Courts of Appeals interpreting statutes analogous to §17(e)(1) which likewise are designed to prevent officials and other "insiders" from operating under conflicts of interest. In *United States* v. *Irwin*, 354 F.2d 192 (2 Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), we held that it was not necessary to show actual conduct to prove the unlawful payment of a gratuity to a public official under 18 U.S.C. §201(f) (1964): "It is not necessary for the Government to show that the gift caused or prompted or in any way affected the happening of the official act." 354 F.2d at 197. In *Howard* v. *United States*, 345 F.2d 126 (1 Cir.), *cert. denied*, 382 U.S. 838 (1965), the First Circuit said that under the anti-kickback statute, 41 U.S.C. §51 (1964), the crime is "complete upon the acceptance of a bribe regardless of whether or not improper action is thereafter taken." 345 F.2d at 128. See also *Krogmann* v. *United States*, 225 F.2d 220, 225 (6 Cir. 1955) (the offense defined by the predecessor to 18 U.S.C. §201(b) "was complete upon the payment of money to Krueger . . . "); *Smith* v. *United States*, 305 F.2d 197, 210 (9 Cir.), *cert. denied*, 371 U.S. 890 (1962) (the statute, 18 U.S.C. §434, superseded by 18 U.S.C. §208, "is directed not only at dishonor, but also at conduct that tempts dishonor . . . " and "whether he actually gives or withholds instructions . . . is immaterial").

Rejection of Deutsch's construction does not make the phrase "acting as agent" superfluous. It defines a subclass of affiliated persons. Within the statutory scheme of §17 (e), affiliated persons are acting either as agents or as brokers, if they are acting as brokers, they may receive limited compensation in connection with portfolio transactions of the registered investment company. 15 U.S.C. §80a-17(e)(2) (1964). If affiliated persons are not acting as brokers, however, they are acting as agents of the investment company and cannot accept compensation in connec-

tion with the purchase or sale of securities. While §17(e) is far from a model of clarity, we believe that an affiliated person is acting as agent within the meaning of §17(e)(1) in all cases when he is not acting as broker for the investment company.

The government and the trial court believed that the phrase "acting as agent" defined a more limited subclass of affiliated persons: those who have the capacity to influence investment decisions. This construction, we believe, is inconsistent with other sections of the Act and with other subsections of §17 itself. One of the primary objectives of the Act was to prevent affiliated persons, and affiliated persons of such persons, from self-dealing and from operating under conflicts of interest. To achieve this objective, Congress thought it necessary to prohibit affiliated persons from engaging in certain types of conduct; accordingly, all other sections of the Act, including the other subsections of §17, prohibt all affiliated persons from engaging in the unlawful conduct. There is no reason to believe that Congress intended to allow certain affiliated persons to accept compensation with the forbidden intent and be immune from violating §17(e)(1).[17] We believe that the more reasonable interpretation of "acting as agent" is that it is a descriptive phrase distinguishing affiliated persons acting as brokers from those who are not acting as brokers in

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17 The government contends that subsection (e)(1) is more stringent than the other subsections of §17 in that §17(b) allows for exemptions for some subsections, but not for subsection (e)(1). From this, the government concludes that §17(e)(1) applies to a more limited class of affiliated persons than the other subsections of §17. However, §6(c) of the Act, 15 U.S.C. §80a-6(c) (1964), permits the SEC to exempt any person from any provision of the Act. This section has been used by the SEC to exempt certain transactions which might otherwise have violated §17(e)(1). See *Drexel & Co.*, 37 S.E.C. 574 (1957); *Axe-Houghton Fund, Inc.*, 25 S.E.C. 133 (1947); *Bankers Securities Corporation*, 24 S.E.C. 39 (1946); *Pathe Film Corporation*, 10 S.E.C. 483 (1941).

connection with a sale or purchase of securities for an investment company.

In view of our interpretation of the phrase "acting as agent," we believe that the trial court erred in submitting to the jury the issue of whether Mills was acting as agent. As we have indicated, "acting as agent" does not require a showing that Mills took any action as a result of being compensated. Since Deutsch did not dispute the facts that Mills was an affiliated person and that Mills was not acting as broker, we believe that the government established, as a matter of law, that Mills was acting as agent for the investment companies within the meaning of §17(e)(1). While the trial court erred in submitting this issue to the jury, it was harmless error, for Deutsch suffered no prejudice. See *United States* v. *Guidice*, 425 F.2d 886, 890 (2 Cir. 1970); *United States* v. *Mingola*, 424 F.2d 710, 713 (2 Cir. 1970); *United States* v. *Ragland*, 375 F.2d 471, 479 (2 Cir. 1967); *cert. denied*, 390 U.S. 925 (1968).

Deutsch makes one final contention about the phrase "acting as agent." He maintains that the phrase was intended to mean acting as agent for an outsider dealing with the investment company and not as agent for the investment company itself. This contention is without merit.

The only support for Deutsch's contention is an isolated comment by David Schenker, Chief Counsel of the SEC Investment Trust Study, during the hearings on the Act. In discussing the reasons for §17(d), which is now §17(e)(1), Mr. Schenker said:

> "You might say, Why did the Commission write that? That is because we found cases where although the controlling person did not sell any property to the investment trust, he was a real estate agent in the transactions in which real estate was sold to the investment trust, and we feel under those circumstances that

> he has this conflict of interest. But he can act as the underwriter or the distributor of securities." Senate Hearings, *supra* note 9, at 262.

While this comment at first blush would appear to substantiate Deutsch's claim that the phrase was intended to apply to agents of outsiders dealing with the investment company, it is far from conclusive. The attorney may have been referring to only one reason for drafting §17(e)(1). Moreover, this isolated comment is insignificant when weighed against the repeated administrative adjudications of the SEC that "acting as agent" means acting as agent for the investment company. See *supra* note 7. On balance, we believe that the more reasonable interpretation is the one adopted by the SEC.

Accordingly, we hold that Deutsch was not prejudiced by the trial court's interpretation of the phrase "acting as agent."

Requisite Intent Under §17(e)(1)

Deutsch maintains that the evidence was insufficient to prove that compensation was given with the intent to influence. We find it unnecessary to reach this issue, because we believe that the trial court erred in charging the jury that, in order to convict, they must find that the compensation was given and received with the intent to influence Mills.[18]

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18 The trial court's charge on this point was as follows:

> ". . . you must determine whether or not the compensation was accepted for the purchase of securities by either Puritan Fund in February or June or by Fidelity Trend Fund in October.
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> If the evidence persuades you beyond a reasonable doubt that Mills held a position where he could influence the purchase of these securities by Puritan Fund or Fidelity Trend Fund and that he was given this compensation because of this position with the intent of influencing him, and that Mills knew that this was the purpose of the compensation, then you may find that this aspect . . . is established."

The language of §17(e)(1) makes no mention of intent to influence; the susection is cast in the familiar "for" terminology of the gratuity statutes (e.g., 18 U.S.C. §§201 (f-i) (1964)) where the only intent required is that the payment be given and accepted in appreciation of past, or in anticipation of future, conduct. We have held that intent to influence is not an element of 26 U.S.C. §7214(a)(2) (1964), which makes it a crime for a federal officer "acting in connection with" the revenue laws to receive "compensation . . . for the performance of any duty." *United States* v. *Cohen*, 387 F.2d 803, 806 (2 Cir. 1967), *cert. denied*, 390 U.S. 996 (1968). Similarly, we have held that the government does not have to show intent to influence to prove an offense under 18 U.S.C. §201(f) (1964), which makes it a crime to give a public official something of value "for and because of any act performed or to be performed." *United States* v. *Irwin*, 354 F.2d 192, 197 (2 Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). See also, *United States* v. *Umans*, 368 F.2d 725, 730 (2 Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967).

The statute in the instant case is similar in this respect to the gratuity statutes. We do not believe that Congress intended that intent to influence should be read into §17(e)(1) of the Act. The paying of compensation is an evil in itself, even though the payor does not corruptly intend to influence the affiliated person's acts, for it tends to bring about preferential treatment in favor of the payor which can easily injure the beneficiaries of investment companies. Congress recognized that affiliated persons had manifold opportunities for self-dealing and designed a statute to remove the potential for conflicts of interest by prohibiting the receipt of compensation "for the purchase or sale of any property. . . ." 15 U.S.C. §80a-17(e)(1). We hold that to read into §17(e)(1) a requirement of intent to influence would frustrate this statutory purpose

Since the requisite intent under §17(e)(1) is intent to give and accept a gratuity in appreciation of past or future conduct, we believe that the evidence was sufficient to prove the necessary intent with respect to the transactions by both Puritan Fund and Fidelity Trend Fund. The jury was justified in finding that the sale of the note at a discounted price was compensation in appreciation of past conduct "which met with [Deutsch's] satisfaction." *United States* v. *Cohen, supra,* 387 F.2d at 806. Deutsch's efforts to sell the issue were unsuccessful until Mills, by committing Puritan to purchase two notes, gave Realty the boost which eventually turned the issue into an overwhelming success. It is equally clear that the jury was entitled to infer that the compensation was "for" the purchase by Fidelity. Mills' conduct in urging the Realty notes on the two managers of the Fidelity Trend Fund is not readily understandable except in the context of Deutsch's relationship to Mills. It would seem unlikely that Mills would want Fidelity Trend to purchase Realty notes at the same time he did, because he would thereby create an invidious comparison between the bargain opportunity he received and the far more expensive purchase he recommended for the fund with which he was affiliated.

The trial court's error in charging the jury that intent to influence was a necessary element of the offense did not prejudice Deutsch, for the erroneous charge merely "exacted a higher standard of proof than the law required." *Killian* v. *United States,* 368 U.S. 231, 258 (1961). In *United States* v. *Heine,* 149 F.2d 485 (2 Cir.), *cert. denied,* 325 U.S. 885 (1945), we held that it was not prejudicial for the trial court to read to the jury a prior version of the statute which contained a specific intent provision omitted from the version under which the defendant was prosecuted: "[I]f it influenced the jury at all, [it] must have done so favorably to defendant." 149 F.2d at 488. At most, the

erroneous charge here imposed on the government the burden of proving an additional element of the offense. The instructions on intent therefore could only have been favorable to Deutsch and do not necessitate reversal. See *United States* v. *Umans, supra,* 368 F.2d at 729.

Claim That Statute is Void for Vagueness

Deutsch claims that §17(e)(1) of the Act is unconstitutional because the language is so vague as to be void under the due process clause of the Fifth Amendment. This claim is without merit.

The applicable test is whether the language conveys "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,* 332 U.S. 1, 8 (1947). See *United States* v. *16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns,* 443 F.2d 463, 466 (2 Cir. 1971). A statute violates due process if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). Even in criminal cases, however, where the vagueness standard is most stringently applied, the statute must only present "ascertainable standard[s] of guilt." *Winters* v. *People of State of New York,* 333 U.S. 507, 515 (1948). As the Supreme Court stated in *Petrillo*:

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . . The Constitution does not require impossible standards." 332 U. S. at 7.

We do not believe that Deutsch was "required at peril of life, liberty or property to speculate as to the meaning of

penal statutes" *Lanzetta* v. *State of New Jersey*, 306 U.S. 451, 453 (1939). Section 17(e)(1) clearly places men of reasonable intelligence on notice that affiliated persons cannot accept compensation in connection with the purchase or sale of property to or for their affiliated investment companies. The phrase "acting as agent" is not so vague as to make men of common intelligence guess at its meaning.[19] We believe that §17(e)(1) establishes standards of guilt which are at least as definite as those in a gratuity statute, e.g., 18 U.S.C. §201(f) (1964), which withstood this same constitutional challenge in *United States* v. *Irwin*, *supra*, 354 F.2d at 196.

Claim That There Was Insufficient Evidence to Prove Compensation

Deutsch argues that the evidence was insufficient to prove the statutory element of compensation. He admits that he sold Mills a note at a substantial discount in October and he does not dispute the trial court's definition of compensation as a "benefit or thing of value [including] being granted an opportunity to purchase securities at a discount price." He claims, however, that he made a commitment to sell one of the notes to Mills in February or March 1968 and that when he made this commitment he had no idea that the Realty note and attached warrant would be so valuable eight or nine months later. He contends that, since compensation must be paid and accepted knowingly and willfully to render him guilty, he did not violate §17(e)(1) by fulfilling an oral agreement which was made with no intention of selling at a discount price.

The trial court, accepting Deutsch's contention that the jury must acquit if they found Deutsch had agreed to sell

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19 Deutsch's claim that §17(e)(1) fails to establish an ascertainable standard of guilt is undermined by his and Mills' evasive conduct in trying to conceal the transaction.

Mills a Realty note in February or March 1968, instructed the jury as follows:

> "If you find that Mills was granted the opportunity for the first time in September or thereafter to purchase these securities at a price which was significantly lower than the price charged other buyers at the same time, then you may find that Mills received compensation in the form of this reduced price.
>
> If, on the other hand, you find that the commitment to Mills was made in February, then you should acquit the defendant."[20]

In view of the jury's verdict, they evidently chose to disbelieve Deutsch's story of a February-March commitment. Deutsch now contends that the issue of compensation should never have gone to the jury, because the government failed to challenge his affirmative defense with directly contradictory proof, and because there was insufficient evidence to prove that the first time Deutsch offered the deal to Mills was in September 1968. These contentions are without merit.

Deutsch's claim that the government was required to offer proof which directly contradicted his testimony about the February-March commitment is frivolous. In *Misciale* v. *United States*, 356 U.S. 386, 388 (1958), the Supreme Court

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20 Deutsch argues on appeal that the trial court's instructions on the February-March commitment improperly placed the burden of proof on him. However, the instructions given were substantially those requested; and in colloquy prior to summations, defense counsel specifically requested the charge on the February-March commitment, despite the trial judge's warning that the jury might misunderstand and think the defense had the burden. There being no plain error, Deutsch's failure to make timely objection below precludes him from raising this issue on appeal. *United States* v. *Peltz*, 433 F.2d 48, 53 n. 6 (2 Cir. 1970); *United States* v. *Proner*, 405 F.2d 943, 945 (2 Cir.), *vacated on other grounds*, 395 U.S. 823 (1969); *United States* v. *DiBrizzi*, 393 F. 2d 642, 646 (2 Cir. 1968); *United States* v. *Indiviglio*, 352 F.2d 276 (2 Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

held that a jury was entitled to disbelieve the defendant's testimony that an informant trapped him into meeting with an undercover agent, notwithstanding the fact that the defendant's testimony was uncontradicted because of the informant's failure to testify. See also *Turner* v. *United States*, 426 F.2d 480, 482 (6 Cir. 1970), *cert. denied*, —— U.S. —— (1971) (alibi defense presents question of fact for jury); *Bushaw* v. *United States*, 353 F.2d 477, 480 (9 Cir.), *cert. denied*, 384 U.S. 921 (1966). That no February-March agreement existed could be proved by evidence of objective facts and circumstances having a rational tendency to show, and from which the jury rationally and logically could find, that no agreement was made. In light of the inherent implausibility that Realty would orally contract, without consideration, to sell a valuable security, at some indefinite time in the future, at an indefinite price, the jury was warranted in disbelieving Deutsch's story. The jury's disbelief is further supported by inconsistencies within Deutsch's own testimony and between his testimony and that of his colleagues, Karp and Stein.

There also was sufficient evidence to entitle the jury to find that the first time Deutsch offered the deal to Mills was in September 1968. The alleged commitment was that Mills could purchase a Realty note on resale when one became available. Notes did become available for resale in August 1968. But Deutsch contacted Massachusetts Life, not Mills, about the possibility of purchasing the securities. Mills did not approach the Shawmut Bank for a loan until September 16, five days after the initial rejection of Deutsch's offer by Massachusetts Life. The jury could logically find that Deutsch did not make an offer to Mills until Massachusetts Life had first turned it down and that Mills had then gone to the bank to see if he could borrow money to purchase the note. Thus, there was sufficient evi-

dence for the jury to find that the offer to Mills was first made between September 11 and 16.

In any event, the trial court's instructions on this issue were more favorable than those to which Deutsch was entitled. He was entitled to an instruction merely that the jury could not convict without being persuaded beyond a reasonable doubt that the agreement to buy a Realty note was made with the knowledge that it constituted something of value. The jury would have been justified in finding that the alleged February-March commitment was something of value. It was an option, obliging Mills to do nothing, but entitling him to buy a Realty note if circumstances made it profitable for him to do so. Options to purchase securities constitute a significant form of executive compensation. Since Deutsch viewed the commitment as binding, the jury would have been entitled to find that the alleged February-March commitment satisfied the statutory element of compensation.

Claim That Evidence of Mills' Crime Was Improperly Admitted

Deutsch argues that he was denied his Sixth Amendment right of confrontation when the trial court admitted evidence which tended to prove that Mills failed to report his personal investment in Realty. We hold that the trial court properly admitted this evidence.

The challenged evidence consists of three documentary exhibits: a copy of an internal code of ethics circulated among all Fidelity officers and employees which required them to make monthly reports of securities they purchased; Mills' monthly reports for the period December 1967 through December 1968, which failed to reflect his purchase of the Realty note; and an SEC statement that there was no record of Mills ever having sought SEC permission

to purchase the security. The trial court admitted the three documents and carefully instructed the jury that they were received solely as proof of the guilt of Mills.[21]

We believe that the trial court's ruling was correct. Proof of the guilt of the principal is admissible at the trial of an accomplice. *Roth* v. *United States,* 339 F.2d 863, 865 (10 Cir. 1964); *Meredith* v. *United States,* 238 F.2d 535, 542 (4 Cir. 1956); *Colosacco* v. *United States,* 196 F.2d 165, 167 (10 Cir. 1952). The documents could be considered by the jury as independent evidence of Mills' guilt, for they showed evasive conduct aimed at concealing the transaction and constituted circumstantial evidence of guilty consciousness; as such, they were independently probative of his guilt. *Mikus* v. *United States,* 433 F.2d 719, 728 (2 Cir. 1970); *United States* v. *Tropiano,* 418 F.2d 1069, 1081 (2 Cir. 1969), *cert. denied sub nom. Grasso* v. *United States,* 397 U.S. 1021 (1970); *United States* v. *Montalvo,* 271 F.2d 922, 927 (2 Cir. 1959), *cert. denied,* 361 U.S. 961 (1960); *United States* v. *Smoim,* 182 F.2d 782, 786 (2 Cir. 1950).

Deutsch's reliance on *Bruton* v. *United States,* 391 U.S. 123 (1968), is misplaced. The documents did not constitute hearsay, for they were not offered for the truth of the matter asserted. Rather, the government offered the documents as circumstantial evidence of Mills' failure to report the transaction, from which the jury could infer conscious-

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21 The trial court's instructions when the three documentary exhibits were admitted are as follows:

> "Ladies and gentlemen of the jury, as I think I indicated to you in the beginning, Mr. Mills is charged with violation of the law. Mr. Deutsch is charged with aiding and abetting Mr. Mills in the violation of the law. In order for Mr. Deutsch to be convicted, the government will have to prove that Mr. Mills violated the law. That is one of the burdens the government will have, in addition to certain others.
>
> So these exhibits are being offered solely proving that Mr. Mills violated the law. You have to get over that hurdle first before you can ever take up the question of whether Mr. Deutsch aided and abetted Mr. Mills in violating the law."

ness of guilt. Assuming that the documents constituted hearsay, however, there are good reasons why *Bruton* should not apply here. The trial court's prompt and clear explanation of the limited purpose for which the records were received was sufficient to negate any possibility of prejudice. See *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055, 1059 (2 Cir. 1970); *United States* v. *Cusumano*, 429 F.2d 378, 381 (2 Cir. 1970); *cert. denied sub nom. Riggio* v. *United States*, 400 U.S. 830 (1970); *United States* v. *Sparano*, 422 F.2d 1095, 1099-1100 (2 Cir. 1970). Moreover, since these documents did not contain any inculpatory statements as to Deutsch, *Bruton* is not applicable. *United States ex rel. Nelson* v. *Follette*, *supra*, 430 F.2d at 1058; *United States* v. *Tropiano*, *supra*, 418 F.2d at 1080-81.

Claim of Improper Comments on Mills' Absence From Trial

Deutsch argues that he was denied a fair trial as the result of certain remarks made by the trial court and the government attorney concerning the absence of Mills as a witness at the trial. We hold that this claim is without merit.

The circumstances surrounding Mills' absence are set forth in an affidavit of Charles A. Stillman, Esq., a member of the firm of Botein, Hays, Sklar and Hertzberg, counsel to Mills, which was filed in opposition to Deutsch's coram nobis petition. The affidavit discloses Mills' availability during the trial:

> "3. At the time of Mr. Mills plea, I informed Government counsel and counsel for the defense that Mills would testify for either side if called as a witness. To this end, Mr. Mills spoke with Assistant United States Attorney Naftalis on a number of occasions. In addition, Mr. Mills was subpoenaed by counsel for Deutsch

as a witness at trial. However, subsequently counsel for Deutsch informed me that Mills would not be called as a witness. Because of the possibility that Mills might be called as a witness by either the defense or prosecution, I had Mills remain in New York City during the course of the trial."

During summation, defense counsel interjected the issue of Mills' absence by indicating that the government should have called Mills and that his absence meant the government felt his testimony would be damaging to its case:

"Deutsch doesn't have the job of proving he is innocent. They have the job of proving he is guilty, and they didn't bring in the one man that could have contradicted three decent, intelligent human beings who have never been in trouble in their lives. . . ."

The government's brief response included the following:

"I can call any witness in the United States and subpoena him whose testimony I think would be favorable and Mr. Gould can subpoena any witness in the United States of America whose testimony Mr. Gould thinks will be favorable. If Mr. Gould thought Mr. Mills' testimony was favorable, he had the power to subpoena him."

Defense counsel made no objection to this argument either at the time of, or after, summation, but it is now challenged for the first time on appeal. Nor did the defense take exception to the trial court's instruction which it now challenges:

"I point out to you that Mills is not under the control of either the government or the defendant. Either side could have subpoenaed him to appear as a witness.

> Under the circumstances you are free to draw whatever inference you wish as to the failure of either party to call Mills, and you need not draw any inference if you do not wish to."

There being no plain error, Deutsch's failure to raise this issue below precludes him from raising it now. *United States* v. *Peltz*, 433 F.2d 48, 53 n. 6 (2 Cir. 1970); *United States* v. *Prouer*, 405 F.2d 943, 945 (2 Cir.), *vacated on other grounds*, 395 U.S. 823 (1969); *United States* v. *DiBrizzi*, 393 F.2d 642, 646 (2 Cir. 1968); *United States* v. *Murphy*, 374 F.2d 651, 655 (2 Cir. 1967); *United States* v. *Indiviglio*, 352 F.2d 276 (2 Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

Aside from the lack of timeliness, there is no merit to Deutsch's claim. Mills was available to both defense and government. The trial court was correct in charging that the jury was free to draw an inference against either party. *United States* v. *DiBrizzi*, *supra*, 393 F.2d at 646; *United States* v. *Armone*, 363 F.2d 385, 404-5 (2 Cir.), *cert. denied*, 385 U.S. 957 (1966); *United States* v. *Beekman*, 155 F.2d 580, 584 (2 Cir. 1946). Moreover, the government's summation clearly was proper. It was merely responsive to defense counsel's summation. *United States* v. *DiBrizzi*, *supra*, 393 F.2d at 645-6.

Deutsch's contention that Mills was actually under the government's control is not supported by the record. He cites no authority for his proposition that a witness who is awaiting sentence on one count and trial on others is under the control of the government. His claim that Mills presumptively was biased against him likewise is unsupported by the record. Deutsch's argument that his and Mills' identity tended to merge during the trial, so that comment on Mills' failure to testify was improper under *Griffin* v. *California*, 380 U.S. 609 (1965), is frivolous. Deutsch him-

self testified, and the identities of the two men were carefully distinguished throughout the trial.

Claim That Government Summation Deprived Deutsch of Fair Trial

Deutsch contends that the summation of the government attorney was improper in that it contained misstatements of law and inflammatory remarks. We hold that this claim is without merit.

Deutsch complains primarily about two statements made during the government's summation:

> (1) "What the Government has to prove is the only reason he gave Mr. Mills the money was because of who Mr. Mills was and what he potentially could do for him and what he had done for him in the past."
>
> (2) "He gave him the money because Mr. Mills is an important man who can do favors in the future. Whether or not the specific favors were the contemplation of Mr. Deutsch at the time he tried and succeeded in corrupting Mr. Mills is unimportant. Whether they were or not, he got a quick return for his money."

The first remark is consistent with the trial court's instructions that the government had to prove Deutsch compensated Mills with the intent of influencing him, and that Mills accepted the deal on that basis. While we have held that the trial court erred in its charge on intent, the remark by government counsel was consistent with the trial court's charge and could not have prejudiced Deutsch by exacting a higher degree of intent than was necessary.

The second remark consists of two parts. One is merely a passing comment on Deutsch's motives and was fair comment on the evidence. The second part of the remark does appear to be inconsistent with the trial court's instructions

on the requisite intent. This remark is consistent, however, with our interpretation of the statute, and Deutsch can claim no prejudice.

Deutsch also argues that it was irrelevant and inflammatory for the government to refer to his sophistication in financial matters and to his insistence that Mills and Levin use nominee names. This claim clearly is without substance. Deutsch's sophistication was relevant to show knowledge on his part of what he was doing. His insistence on the use of nominee names evinced a desire to conceal the transaction, from which the jury could infer consciousness of guilt. Moreover, in the context in which the statements were made, they fairly pointed out appropriate inferences to be drawn from the proof and were not inflammatory. *Cf. United States* v. *Edelman*, 414 F.2d 539, 542 (2 Cir. 1969), *cert. denied*, 396 U.S. 1053 (1970); *United States* v. *Capaldo*, 402 F.2d 821 825 (2 Cir. 1968), *cert. denied* 394 U.S. 989 (1969); *United States* v. *DiBrizzi*, *supra*, 393 F.2d at 646; *United States* v. *DeAlasandro*, 361 F.2d 694, 697 (2 Cir.), *cert. denied*, 385 U.S. 842 (1966); *United States* v. *DeFillo*, 257 F.2d 835, 840 (2 Cir. 1958), *cert. denied*, 359 U.S. 915 (1959).

Claim That Dismissal of Count Five Precluded Conviction on Count Six

Finally, Deutsch argues that he could not be convicted as an aider and abettor on Count Six, because Count Five charging Mills as principal subsequently was dismissed. This claim is without merit.

At Deutsch's trial in April 1970, the trial court instructed the jury that, in order to find Deutsch guilty as an aider and abettor, they first had to find that Mills had committed the principal offense, i.e. had violated §17(e)(1) of the Act. In view of the verdict, the jury must have found that

Mills had violated §17(e)(1). The fact that Count Five subsequently was dismissed when Mills was sentenced the following month does not undermine the conviction of Deutsch on Count Six.

To sustain the conviction of one who has been charged as an aider and abettor, it is necessary that there be evidence showing an offense to have been committed by the principal, and that the principal was aided and abetted by the accused. It is not incumbent upon the prosecution, however, to prove that the principal has been either convicted or acquitted of the offense. *Hendrix* v. *United States*, 327 F.2d 971, 975 (5 Cir. 1964); *Perkins* v. *United States*, 315 F.2d 120, 122 (9 Cir. 1963); *Meredith* v. *United States*, *supra*, 238 F.2d at 542; *Colosacco* v. *United States*, *supra*, 196 F.2d at 167. In the instant case, the government presented sufficient evidence to establish that Mills had committed the offense. That was all the government was required to show.

We have considered Deutsch's other claims of error and find them to be without merit.[22]

Affirmed.

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22 Except to the extent mentioned in the foregoing opinion, we do not find it necessary to discuss separately Deutsch's claims raised on the appeal from denial of his post-conviction motion seeking coram nobis relief. His claims on that appeal are not materially different from those raised on the appeal from this judgment of conviction. We have considered them carefully and find them without merit.

Opinion by Judge Metzner Denying Reserved Motion for Acquittal and Motion for New Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Cr. 335

#36881

UNITED STATES OF AMERICA

against

FRANK D. MILLS and JEROME DEUTSCH,

Defendants.

METZNER, D. J.:

At the conclusion of the trial the court reserved decision on defendant Deutsch's motion for judgment of acquittal. The jury rendered a verdict of guilty on the one count that was submitted to it for determination. Defendant Deutsch has now moved for a new trial.

It is urged that the court, in ruling on the motion for judgment of acquittal, apply the quantum of proof rule that the motion be granted if the jury could not reasonably have inferred guilt beyond a reasonable doubt. See *United States* v. *Melillo*, 275 F. Supp. 314 (E.D.N.Y. 1967); *United States* v. *Chas. Pfizer & Co.*, 281 F. Supp. 837 (S.D.N.Y. 1968), *rev'd on other grounds*, —— F.2d —— (2d Cir. Apr. 16, 1970). Until the Court of Appeals explicitly reverses its oft-repeated holding that the quantum in criminal cases is the same as in civil cases, this court will adhere to that rule. *United States* v. *Masiello*, 235 F.2d 279, 284 (2d Cir. 1956); *United States* v. *Castro*, 228 F.2d 807 (2d Cir. 1956); *United States* v. *Feinberg*,

140 F.2d 592, 594 (2d Cir. 1944); *cf. Neaderland* v. *Commissioner*, —— F.2d —— (2d Cir. Apr. 10, 1970). In applying this rule the government is entitled to the most favorable inferences that can be drawn from the evidence. The motion for judgment of acquittal is denied.

The motion for a new trial also seeks review of the weight of the evidence, but the government does not have the advantage of the "most favorable inference" rule. As stated in 2 Wright, Federal Practice and Procedure, §553 at 487 (1969):

> "The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evdience preponderates heavily against the verdict."

This is not such a case where the evidence preponderates heavily against the verdict.

Numerous arguments have been raised regarding §17 (e)(1) of the Investment Company Act of 1940, 15 U.S.C. §80a-17(e)(1), which was the statute alleged to have been violated in the count submitted to the jury. The defendant requested the court to charge the jury that acting as agent for an investment company "means you must find that Mr. Mills had the power to make investment decisions for the investment company, or had a voice in the making of such decisions." The only difference between this request and the court's charge is that the court substituted the words "as a result of his position in the company, he could influence the decisions" for the requested words "had a voice in the making of such decisions." Insofar as the charge to the jury is concerned, the court will stand on that charge.

Defendant claims that §17(e)(1) applies only to transactions in real estate and that it relates only to a situa-

tion where an affiliated person acts as agent for the seller to an investment company. These contentions are raised for the first time on this motion for a new trial. They run counter to the view of the law contained in defendant's requests to charge referred to above. The request for a new trial on the new assumptions is consequently denied.

It is asserted that §17(e)(1) is unconstitutionaly vague on its face, and certainly as applied in the court's charge. The question of vagueness is not properly before this court on this motion for a new trial. See *United States* v. *Wolfson*, 405 F.2d 779, 783 (2d Cir. 1968), *cert. denied*, 394 U. S. 946 (1969).

I do not find that the prosecutor in his summation made impermissible misstatements regarding the law applicable to the case. Furthermore, the jury was explicitly told that it was to accept the meaning of the law as the court charged it, and the charge correctly stated the law.

In defendant's reply brief submitted on this motion for a new trial, an additional ground is urged for granting the motion. During the course of the trial certain evidence was properly admitted on counts that were subsequently dismissed at the end of the government's case. During its deliberations the jury made inquiry concerning this evidence. In answering the inquiry the court sufficiently admonished the jury regarding the applicability of that evidence to the count which was being considered.

The motion for a new trial is denied. The defendant shall appear for sentencing on August 4, 1970 in Room 318 of this courthouse at 10:30 A.M.

So ordered.

Dated: New York, N. Y.
June 18, 1970

CHARLES M. METZNER
U. S. D. J.

Opinion and Order by Judge Metzner Declining Jurisdiction in *Coram Nobis*; Docket No. 71-1180

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 4784

#37372

UNITED STATES OF AMERICA

v.

JEROME DEUTSCH,

Defendant.

Appearances:

WHITNEY NORTH SEYMOUR, JR., United States Attorney, Southern District of New York, for the United States of America; Gary P. Naftalis, Assistant United States Attorney, Southern District of New York, Of Counsel.

JOHN VAN VOORHIS, of New York, N. Y., Attorney for defendant.

METZNER, D. J.:

This is an application for relief by way of 28 U. S. C. §2255 or writ of error coram nobis or for a new trial by the defendant, Jerome Deutsch, whose appeal from a judgment of conviction is pending in the Court of Appeals.

The original indictment contained 7 counts, but the last count was withdrawn and dismissed prior to trial. Count

1 charged Frank D. Mills with violating §17(d) of the Investment Company Act of 1940 with relation to the Puritan Fund. Count 2 made a similar charge with relation to the Fidelity Trend Fund. Count 3 charged Deutsch with aiding and abetting Mills in the violation charged in Count 1. Count 4 charged Deutsch with aiding and abetting Mills in the violation charged in Count 2. Count 5 charged Mills with violating §17(o) of the Investment Company Act of 1940. Count 6 charged Deutsch with aiding and abetting Mills in the violation charged in Count 5.

Prior to trial Mills changed his original plea of not guilty to guilty to Count 1. In accordance with the usual practice in this court, Counts 2 and 5 to which the plea of not guilty was still interposed were carried over to the day of sentence.

The trial then proceeded against Deutsch. Counts 3 and 4 were dismissed by the court on defendant's motion at the end of the government's case. At the end of the entire case the court reserved decision on the defendant's motion for judgment of acquittal on Count 6. The Count was submitted to the jury, which found the defendant guilty as charged. Counsel were afforded an opportunity to submit briefs on the motion for judgment of acquittal and for a new trial. In the meantime, Mills was sentenced on Count 1 and at the time of sentence, following the usual procedures, Counts 2 and 5 were dismissed with the consent of the government. The motions by Deutsch were subsequently denied and he was then sentenced on the guilty verdict.

Opinion and Order by Judge Metzner

By this motion defendant seeks to obtain a ruling that he was denied a fair trial because of the procedures taken regarding Mills. He claims that because of the peculiar interrelationship of the counts in the indictment, with Mills being charged as principal and he as an aider and abettor, Mills should have been sentenced before Deutsch's trial. This would have put the case in a different posture in view of the dismissal of Count 5 against Mills, which count was the predicate for Count 6, on which Deutsch was convicted. He further argues a suppositious agreement between the prosecution and counsel for Mills which put the latter in control of the prosecution. This, he claims, allowed the jury to draw unfair inferences from Mills' failure to testify. The prosecution did not call Mills as a witness and the defense, although it subpoenaed Mills, also failed to call him.

Defendant urges that despite the pendency of the appeal from the judgment of conviction he may move this court for collateral relief where the claim is the fundamental unfairness of the trial based on matters not appearing in the record. In *United States* v. *Angelet*, 255 F. 2d 383, 384 (2d Cir. 1958), it was held that a motion under §2255 cannot be used in lieu of an appeal to correct errors committed in the course of a trial. It has also been held that the district court is without jurisdiction to entertain a §2255 motion if the movant is not in custody. *United States* v. *Brilliant*, 274 F. 2d 618, 620 (2d Cir. 1960). The defendant here is not in custody. However, in *United States* v. *Morgan*, 346 U. S. 502 (1954), the Court held that relief based upon a claim of violation of constitutional rights could be afforded a person not in custody through the common law writ of error coram nobis. In coming to this conclusion, the Court held that §2255 was not intended to cover the entire field of remedies in the nature of coram nobis in the federal courts.

It said at page 511: "We do not think that the enactment of §2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion." The power to grant this relief flows from the all-writs section, 28 U. S. C. §1651(a).

Finally, it has been said that the determination of the direct appeal may render collateral attack unnecessary. *Womack* v. *United States,* 395 F. 2d 630 (D. C. Cir. 1968); *Black* v. *United States,* 269 F. 2d 38 (9th Cir. 1959). While there is no jurisdictional bar to the district court entertaining this application, the question presented is not one of power but of discretion. Relief is sought by way of an extraordinary remedy and should not be granted in the absence of extraordinary circumstances.

There is nothing presented on this motion that does not appear in the court record of this indictment. The rules provide that a certified copy of the docket entries is part of the record on appeal. Rule 10, Federal Rules of Appellate Procedure. The disposition of the indictment as to Mills appears in those docket entries. Consequently all of the arguments and hypotheses presented by counsel in the moving papers here may be presented on the appeal from the judgment of conviction. The material contained in the affidavits submitted also appears, although in unsworn form, in the record. I take it that statements by counsel to the trial court will not be given any less weight because of this fact.

Consequently the court refuses to entertain this motion. See *United States* v. *Brilliant, supra.*

So ordered.

Dated: New York, N. Y.
January 29, 1971

CHARLES M. METZNER
U. S. D. J.

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of September one thousand nine hundred and seventy-one.

Present:

HON. WILFRED FEINBERG,
HON. WILLIAM HUGHES MULLIGAN,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK D. MILLS, JEROME DEUTSCH,

Defendants,

JEROME DEUTSCH,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Statutes

15 U. S. C.:

§80a—2. Definitions

(a) When used in this subchapter, unless the context otherwise requires

• • •

(3) "Affili...ed person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

• • •

§80a—3. Same; investment company

(a) When used in this subchapter, "investment company" means any issuer which——

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies.

(b) Notwithstanding parargaph (3) of subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses. The filing of an application under this paragraph in good faith by an issuer other than a registered investment company shall exempt the applicant for a period of sixty days from all provisions of this subchapter applicable to investment companies as such. For cause shown, the Commission by order may extend such period of exemption for an additional period

or periods. Whenever the Commission, upon its own motion or upon application, finds that the circumstances which gave rise to the issuance of an order granting an application under this paragraph no longer exist, the Commission shall by order revoke such order.

(3) Any issuer of all the outstanding securities of which (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by paragraph (1) or (2) of this subsection.

(c) Notwithstanding subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. For the purposes of this paragraph, beneficial ownership by a company shall be deemed to be beneficial ownership by one person; except that, if such company owns 10 per centum or more of the outstanding voting securities of the issuer, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper).

(2) Any person primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, and acting as broker, or any one or more of such activities, whose gross income normally is derived principally from such business and related activities.

(3) Any bank or insurance company; any savings and loan association, building and loan association, coopera-

tive bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian; or any common trust fund or similar fund, established before June 22, 1936, by a corporation which is supervised or examined by State or Federal authority having supervision over banks, if a majority of the units of beneficial interest in such fund, other than units owned by charitable or educational institutions, are held under instruments providing for payment of income to one or more persons and of principal to another or others.

(4) Any person substantially all of whose business is confined to making small loans, industrial banking, or similar businesses.

(5) Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

(6) Any company primarily engaged, directly or through majority-owned subsidiaries, in one or more of the busi-

nesses described in paragraphs (3), (4), and (5) of this subsection, or in one or more of such businesses (from which not less than 25 per centum of such company's gross income during its last fiscal year was derived) together with an additional business or businesses other than investing, reinvesting, owning, holding, or trading in securities.

(7) Any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company: *Provided,* That the assets of the controlled company consist substantially of securities issued by companies which are subject to regulation under the Interstate Commerce Act.

(8) Any company subject to regulation under the Public Utility Holding Company Act of 1935.

(9) Any person substantially all of whose business consists of owning or holding oil, gas, or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases, or fractional interests.

(10) Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(11) Any employees' stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of Title 26; or any collective trust fund maintained by a bank consisting solely of assets of such trusts; or any separate account the assets of which are derived solely from (A) contributions under pension

or profit-sharing plans which meet the requirements of such section or the requirements for deduction of the employer's contribution under section 404(a) (2) of Title 26, and (B) advances made by an insurance company in connection with the operation of such separate account.

(12) Any voting trust the assets of which consist exclusively of securities of a single issuer which is not an investment company.

(13) Any security holders' protective committee or similar issuer having outstanding and issuing no securities other than certificates of deposit and short-term paper.

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§80a—17. Transactions of certain affiliated persons and underwriters

(a) It shall be unlawful for any affiliated person or promoter of or principal underwriter for a registered investment company (other than a company of the character described in section 80a—12(d)(3) (A) and (B) of this title), or any affiliated person of such a person, promoter, or principal underwriter, acting as principal——

(1) knowingly to sell any security or other property to such registered company or to any company controlled by such registered company, unless such sale involves solely (A) securities of which the buyer is the issuer, (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities, or (C) securities deposited with the trustee of a unit investment trust or periodic payment plan by the depositor thereof;

(2) knowingly to purchase from such registered company, or from any company controlled by such

registered company, any security or other property (except securities of which the seller is the issuer); or

(3) to borrow money or other property from such registered company or from any company controlled by such registered company (unless the borrower is controlled by the lender) except as permitted in section 80a—21(b) of this title.

(b) Notwithstanding subsection (a) of this section, any person may file with the Commission an application for an order exempting a proposed transaction of the applicant from one or more provisions of said subsection. The Commission shall grant such application and issue such order of exemption if evidence establishes that——

(1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;

(2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under this subchapter; and

(3) the proposed transaction is consistent with the general purposes of this subchapter.

(c) Notwithstanding subsection (a) of this section, a person may, in the ordinary course of business, sell to or purchase from any company merchandise or may enter into a lessor-lessee relationship with any person and furnish the services incident thereto.

(d) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company

(other than a company of the character described in section 80a—12(d)(3) (A) and (B) of this title), or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant. Nothing contained in this subsection shall be deemed to preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

(e) *It shall be unlawful for any affiliated person of a registered investment company*, or any affiliated person of such person——

(1) *acting as agent, to accept from any source any compensation* (other than a regular salary or wages from such registered company) *for the purchase* or sale *of any property* to or *for such registered company* or any controlled company thereof, except in the course of such person's business as an underwriter or broker; or

(2) acting as broker, in connection with the sale of securities to or by such registered company or any controlled company thereof, to receive from any source a commission, fee, or other remuneration for effecting such transaction which exceeds (A) the usual and customary broker's commission if the sale

is effected on a securities exchange, or (B) 2 per centum of the sales price if the sale is effected in connection with a secondary distribution of such securities, or (C) 1 per centum of the purchase or sale price of such securities if the sale is otherwise effected unless the Commission shall, by rules and regulations or order in the public interest and consistent with the protection of investors, permit a larger commission (emphasis added).

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§80a—47. Procuring violation of subchapter; obstructing compliance

(a) It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this subchapter or any rule, regulation, or order thereunder.

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§80a—48. Penalties

Any person who willfully violates any provision of this subchapter, shall upon conviction be fined not more than $10,000 or imprisoned not more than two years, or both.

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AMENDMENT [V.]

Capital crimes, double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of

a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 18, UNITED STATES CODE, SECTION 201

[This statute is not involved but is discussed in the Court of Appeals opinion]

Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official func-

tion, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent——

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom——

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom——

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness

fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed, in sections 1503, 1504 and 1505 of this title.

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TITLE 17, CODE OF FEDERAL REGULATIONS, SECTION 270.17d-1

[This regulation relates to the counts under §80-17 which were dismissed]

Applications regarding joint enterprises or arrangements and certain profit-sharing plans.

(a) No affiliated person of or principal underwriter for any registered investment company (other than a company of the character described in section 12(d)(3) (A) and (B) of the act) and no affiliated person of such a person or principal underwriter, acting as principal, shall participate in, or effect any transaction in connection with, any joint enterprise or other joint arrangement or profit-sharing plan in which any such registered company, or a company controlled by such registered company, is a participant, and which is entered into, adopted or modified subsequent to the effective date of this rule, unless an application regarding such joint enterprise, arrangement or profit-sharing plan has been filed with the Commission and has been granted by an order entered prior to the submission of such plan or modification to security holders for approval,

or prior to such adoption or modification if not so submitted, except that the provisions of this rule shall not preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

(b) In passing upon such applications, the Commission will consider whether the participation of such registered or controlled company in such joint enterprise, joint arrangement or profit-sharing plan on the basis proposed is consistent with the provisions, policies and purposes of the act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

(c) "Joint enterprise or other joint arrangement or profit-sharing plan" as used in this section shall mean any written or oral plan, contract, authorization or arrangement, or any practice or understanding whereby a registered investment company or a controlled company thereof and any affiliated person of or a principal underwriter for such registered investment company, or any affiliated person of such a person or principal underwriter, have a joint or a joint and several participation, or share in the profits of such enterprise or undertaking, but shall not include an investment advisory contract subject to section 15 of the act.

(d) Notwithstanding the requirements of paragraph (a) of this section, no application need be filed pursuant to this section with respect to any of the following:

(1) Any profit-sharing plan provided by any controlled company which is not an investment company for its officers or employees, provided no affiliated person of any

investment company which is an affiliated person of such controlled company participates therein.

(2) Any plan provided by any registered investment company or any controlled company for its officers or employees if such plan has been qualified under section 401 of the Internal Revenue Code of 1954 and all contributions paid under said plan by the employer qualify as deductible under section 404 of said Code.

(3) Any loan or advance of credit to, or acquisition of securities or other property of, a small business concern, or any agreement to do any of the foregoing ("Investments"), made by a bank and a small business investment company (SBIC) licensed under the Small Business Investment Act of 1958, whether such transactions are contemporaneous or separated in time, where the bank is an affiliated person of either (i) the SBIC or (ii) an affiliated person of the SBIC; but reports containing pertinent details as to Investments and transactions relating thereto shall be made at such time, on such forms and by such persons as the Commission may from time to time prescribe.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-557

JEROME DEUTSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of having aided and abetted one Mills in knowingly accepting compensation from the issuer of certain securities, while Mills was "acting as agent" for certain registered investment companies, in violation of 15 U.S.C. 80a-17 (e)(1). He was sentenced to pay a fine of $10,000.

The court of appeals affirmed in a comprehensive opinion (Pet. 1a-36a).

Petitioner raises numerous questions, primarily concerning the construction of the underlying statute. His claims are fully discussed and properly rejected in the comprehensive opinion below on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 449935 296